

No. 10748

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & MILLER, CON-
TRACTORS, INC., a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

JUN 21 1935

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Los Angeles, California

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Tucson, Arizona

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Assistant United States Attorney
Tucson, Arizona

Attorney for Appellee [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
In and For the District of Arizona

Civil Action File No. 99 Tucson

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Plaintiffs,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & MILLER, CON-
TRACTORS, INC., a corporation,

Defendants.

COMPLAINT

Come now the plaintiffs above named and com-
plaining of the defendants above named, respect-
fully allege:

I.

The ground upon which the jurisdiction of this
Court depends is the diversity of citizenship of the
parties and the fact that the amount in controversy
exceeds, exclusive of interest and costs, the sum of
\$3,000.00. In this connection plaintiffs allege that
each of the plaintiffs is a citizen and resident of the
County of Los Angeles, State of California, that the
defendant, Del E. Webb, doing business under the
name and style of Del E. Webb Construction Co., is
a citizen and resident of the County of Maricopa,
[4] State of Arizona, and that the defendant, White

& Miller, Contractors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal place of business in the County of Pima, State of Arizona.

II.

That on or about the 1st day of December, 1940, by a contract in writing, denominated "Equipment Rental Agreement", a copy of which is hereto attached, marked "Exhibit A", and by reference made a part hereof, plaintiffs rented to defendants that certain Austin Trenching Machine, more specifically described in said agreement, for use by said defendants in certain construction work being prosecuted and carried on by defendants at Fort Huachuca, Arizona.

III.

That pursuant to said rental agreement plaintiffs delivered to defendants said trenching machine and that at the time it was so delivered said trenching machine was in a condition to render efficient, economic and continuous service and in such condition was accepted and received by defendants.

IV.

That said rental agreement provided that all necessary minor or field repairs to said trenching machine during the rental period should be made by defendants.

V.

That defendants failed, during said rental period, to make necessary minor and field repairs upon [5]

said trenching machine and that by reason of defendants' failure in this respect and as a direct and proximate result thereof, the said trenching machine when returned to plaintiffs on or about April 7, 1941 was in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service, and was not in the condition in which it was received by defendants from plaintiffs, reasonable and ordinary wear and tear excepted.

VI.

That for the purpose of having said trenching machine restored to the same reasonable condition as when delivered by plaintiffs to defendants as aforesaid, plaintiffs were obliged to expend and did expend and pay the sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38) for reasonable repairs to said trenching machine, which repairs were made necessary by defendants' failure to have necessary and minor field repairs made to said trenching machine as from time to time needed and that by reason of defendants' failure to make said repairs, and as a direct and proximate result of such failure, while in use by said defendants under said rental agreement, plaintiffs have been damaged in said sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38).

VII.

That a period of thirty days was necessarily consumed in making said reasonable repairs to said

trenching machine and that during said period of thirty days plaintiffs were deprived of the use of said trenching [6] machine; that the reasonable monthly rental value of said trenching machine is Fifteen Hundred Dollars (\$1500.00), and that plaintiffs were further damaged by reason of defendants' failure to make said repairs in the sum of Fifteen Hundred Dollars (\$1500.00).

Wherefore, plaintiffs pray judgment against defendants for the sum of Three Thousand Six Hundred and 38/100 Dollars (\$3,600.38), and for costs of suit herein.

CONNER & JONES

By ARCHIE R. CONNER

305 Valley National Bldg.

Tucson, Arizona

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

Attorneys for Plaintiffs [7]

EXHIBIT A

EQUIPMENT RENTAL AGREEMENT

This Contract, entered into this 1st day of December, 1940 by Culjak and Zelko 1354 S. Bonnie Beach Place, Los Angeles, California ~~*a corporation,~~
~~organized and existing under the laws of the State~~
~~of ———~~ *a partnership consisting of Martin Culjak and Sgt. Zelko ~~*an individual trading as ———~~

*Delete all lines which do not apply.

of the City of Los Angeles in the state of California hereinafter called Lessor, and Del E. Webb Const. Co. and White and Miller Contractors, Incorporated, a corporation organized and existing under the laws of the State of Arizona of the City of Tucson, (Principal Office P. O. Box 2350) in the State of Arizona hereinafter called the Lessee,

Whereas, the Lessee has heretofore, to wit, on the 30th day of October, 1940, enter into a contract hereinafter called the principal contract, with the United States of America, hereinafter called the Government, to construct for the Government a complete Cantonment Camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at or near Fort Huachuca, Arizona.

Whereas, the Lessor has agreed to rent to the Lessee for use in connection with the aforementioned construction the equipment leased on schedule "A" attached hereto and made a part hereof; and

Whereas, the Lessor has read and is familiar with each and every part of said principal contract, and the respective rights, powers, benefits and liabilities of the Lessee and the Government thereunder;

Now, Therefore, This Agreement Witnesseth: That the parties hereto do mutually agree as follows:

Article I

The Lessor shall furnish the equipment listed on Schedule [8] "A" attached hereto and made a part hereof. Equipment shall be in a condition to render

efficient, economic and continuous service. Each piece of equipment shall be clearly marked with the identification number set opposite such piece on schedule "A".

Article II

All necessary minor or field repairs to equipment shall be made by the Lessee without cost to the Lessor. Other than minor or field repairs shall be made by the Lessor without cost to the Lessee. All gasoline and oil for the operation of such equipment will be furnished by the Lessee.

Article III

Equipment is rented without operators. Any operator deemed incompetent by the Lessor and the Lessee shall be removed from any piece of equipment. Should the Lessor and the Lessee fail to agree as to the competency of any operator the matter shall be submitted to the Contracting Officer who signed the principal contract and his decision shall be final as to the parties hereto.

Article IV

The Lessor shall initiate shipment of the equipment to the site of the work immediately. It is estimated that the equipment will be used for approximately 700 working hours, but the Lessee reserves the right to increase or decrease the rental period.

Article V

A. The Lessor shall be paid at the rate prescribed in Schedule "A". The rental period shall begin on

the delivery of such equipment to a common carrier for shipment to the site of the work, as evidenced by the Bill of Lading covering such shipment, and shall terminate, unless title to the equipment passes to the Government at an earlier date, on the date of delivery of such equipment to a common carrier, for shipment from the [9] site of the work, as evidenced by the Bill of Lading covering such shipment, provided such equipment is delivered without delay after notice by the Lessee or the Contracting Officer, of the principal contract, to the Lessor that such equipment is no longer required; otherwise the rental shall terminate on the date of such notice. If such equipment is not in sound and workable condition when it arrives, at the work site the rental period therefor shall not begin until such equipment shall have been placed in sound and workable condition at the expense of the Lessor. No transportation charges for the shipment thereof shall be paid by the Lessee for any piece of equipment which arrives at the work site in other than sound and workable condition if such piece of equipment cannot be placed in sound and workable condition. The determination as to whether such equipment is in sound and workable condition shall, in every instance, be made by the Contracting Officer or his duly authorized representative. Slight delays in the use of any piece of equipment caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the use of

such piece of equipment caused by other than necessary minor or field repairs.

B. The minimum rental set forth in Schedule "A" shall be allowed for equipment in good repair and retained at the site of the work, provided such retention is approved in writing by the Contracting Officer or his duly authorized representative. Transportation will be paid by the Lessee f.o.b. cars at original point of shipment, and return transportation f.o.b. cars to the original point of shipment, or equivalent mileage, but charges for transportation of any piece of equipment over a distance in excess of Five Hundred Miles (500) must have written approval of the Contracting Officer or his duly authorized representative. [10] Only loading and/or unloading costs incurred at the worksite will be paid by the Lessee. Rental payments will be monthly on or about the 10th of the month for the previous calendar month.

Article VI

Failure of any piece of equipment to perform to the satisfaction of the Lessee or the Contracting Officer or his duly authorized representative shall be sufficient cause for the termination of this contract by the Lessee, or the requirement by the Lessee that the equipment be replaced with equipment of satisfactory performance.

Article VII

When the equipment rented hereunder shall arrive at the site of the work the Lessor shall file with the Lessee a schedule setting forth, (1) the fair

valuation of each piece of equipment at the time of its arrival and (2) the names and addresses of any and all persons holding any lien or encumbrance of any nature whatsoever against such piece of equipment together with the amount of the indebtedness secured by such lien or encumbrance. Such valuation shall be deemed final unless within ten days (10) after the equipment has been set up and operating, the Lessee or the Contracting Officer or his duly authorized representative shall modify such valuation. When and if the total rental paid to the lessor for any piece of equipment shall equal the value thereof, ~~plus one percent per month for each month or fraction thereof such piece of equipment shall have been in use,~~ no further rental shall be paid to the lessor and title shall vest in the Government. At the completion of the work or upon termination of the principal contract as provided in Article VI of the principal contract, the Government may at its option purchase any piece of such equipment by paying the Lessor the difference [11] between the valuation of such equipment ~~plus 1% per month for each month or part thereof such piece of equipment shall have been in use~~ and the total rental paid therefore for such piece of equipment.

Article VIII

Neither this contract nor any interest therein shall be assigned or transferred, except that the whole or any part is assignable to the Government.

Article IX

The Contractor shall have the same right and under the same conditions and terms to terminate this contract as has the Government in the principal contract.

Article X

This contract shall be subject to the written approval of the contracting Officer who executed the principal contract, or his duly authorized representative, and shall not be binding until so approved.

Article XI

The following changes were made in this agreement before it was signed by the parties hereto:

Article VII—Line 11—delete—“plus one percent per month for each month or fraction thereof such piece of equipment shall have been in use.” Delete—Line 18—“plus 1% per month for each month or part thereof such piece of equipment shall have in use.

This contract covers the rental of Austin Trenching Machine No. 11346—Model BE—Type C—Style 500 Twin City Engine Mfg. by the Minneapolis Steel and Mach. Co. Engine No. 350173.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

CULJAK & ZELKO

Lessor

By: (Signed) MARTIN CULJAK

Co-Partner

DELL E. WEBB CONSTRUCTION CO.

and

WHITE & MILLER CONTRACTORS, INC.

Lessee

By: (Signed) E. G. SHAUER

Office Mgr.

(Title)

Witness: [12]

(1) (Signed) A. E. FLEMING

(2) [Signature illegible]

(1) (Signed) J. C. MEADOWS

(2) (Signed) OLGA KNUTSON

I, Martin Culjak, certify that I am the co partner, Co Partnership named as the lessor herein; that Martin Culjak, who signed this agreement on behalf of the Lessor, was then Co Partner of said Co Partnership that said agreement was duly signed for and in behalf of said Co Partnership by au-

thority of its governing body, and is within the scope of its powers, as a co Partner

[Corporate Seal] Sgd. MARTIN CULJAK

Place 1354 S. Bonnie Beach
Place, Los Angeles, Cali--
fornia

Date January 13, 1941

I, E. G. Shauer, certify that I am the Office Mgr., secretary of the corporation named as the Lessee herein; that E. G. Shauer, who signed this agreement on behalf of the Lessee, was then Office Mgr. of said corporation; that said agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[Corporate Seal]

Place Fort Huachuca, Ariz.

Date Dec. 4, 1940

Approved:

[Illegible] (?J Moore?)

Lt. Col. QMC [13]

Schedule A	No. 38	Valuation	Machine	Rental
------------	--------	-----------	---------	--------

Type of Equipment:

Trenching Machine 16'

Chain bucket type

Manufacturer: Austin

Mfg. Co., Muskegon, Mich

Year of Model: Model BE

Type C—Style 500 Mach-

ine No. 11346	\$20,000.00	\$1500.00 per
		month for 1
		-8 hour shift

Type of Equipment:

Manufacturer

Year of Model

Item I

The lessee shall initiate shipment of equipment to the site of the work immediately. It is estimated that the equipment will be used for approximately 700 working hours, but the lessee reserves the right to increase or decrease the rental period.

Item II

A minimum rental period of 60 ~~hours per week~~ or days ~~per month~~ shall be allowed for equipment in good repair and retained at the site of the work, provided such retention is approved in writing by the constructing officer or his duly authorized representative. [14]

[Endorsed]: Filed August 22, 1941. [15]

[Title of District Court and Cause.]

ORDER TO FURNISH BILL OF
PARTICULARS

The defendants' motion for a more definite statement and for a bill of particulars having been referred to the Court and after being advised in the premises, it is ordered:

I.

That within fifteen (15) days after the service of this order on the attorneys for the plaintiffs, the plaintiffs deliver to the defendants' attorney a bill of particulars of the demand for which this action is brought stating fully the names of the person or persons to whom the said sum of money, to-wit: Two Thousand One Hundred and 38/100 (\$2,100.38) Dollars was paid.

II.

The particular parts purchased and used in the repair of said machine and the person or persons from whom such parts were purchased.

III.

The price paid for each of said parts.

IV.

The amount of labor employed in the repair of said [16] machine and the particular persons performing such labor.

V.

The time when said labor was paid for and the said parts purchased.

VI.

That plaintiffs set forth how and wherein said trenching machine was not in condition to render efficient, economic and continuous service when returned to plaintiffs.

VII.

That plaintiffs state what minor field repairs were not made by defendants upon said trenching machine.

VIII.

That plaintiffs be required to state the particulars as to how the said trenching machine, when returned to plaintiffs, was damaged and deteriorated.

IX.

That plaintiffs state in what particular said machine was not in the condition in which it was when received by defendants from plaintiffs, reasonable wear and tear excepted.

November,
Dated this 3rd day of ~~October~~, A. D. 1941.

ALBERT M. SAMES

Judge, United States District
Court for the District of
Arizona

JPD:L [17]

[Endorsed]: Filed November 3, 1941. [18]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Come now the plaintiffs in the above entitled action and complying with the order heretofore made and entered in the above entitled action requiring plaintiffs to furnish defendants with a bill of particulars of the demand for which the above entitled action is brought, respectfully state as follows:

I.

The particular parts purchased and used in the repair of plaintiff's trenching machine rented to defendants, and the person or persons from whom such parts were purchased, the time when said parts were purchased, and the price paid for each of said parts, are as follows:

82 Multipedal slats and bolts, purchased from Harry C. Collins, 5753 South Alameda Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of.....	\$ 1199.33
---	------------

[19]

2 Idler shafts, purchased from Harry C. Collins, 5753 South Alameda Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of	\$ 30.90
---	----------

150 Excavator chain links, purchased from Alloy Steel and Metals Company, 1862 East 55th Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of.....	757.05
---	--------

On or about September 1, 1941, Pioneer Blacksmith & Welding Company, 129 Llewellyn Street, Los Angeles, California, welded two gears, repaired backfiller board drawbar and supplied ten bolts, all for the sum and price of.....	33.77
---	-------

II.

The amount of labor employed in the repair of said machine, the particular persons performing such labor, and the time when said labor was paid for, are as follows, to-wit:

John Arambel @ 75c per hour

1941

Aug. 28 8 hrs.

Aug. 29 8 hrs.

Sept. 2 4 hrs.

Sept. 6, Paid.....\$15.00

Sept. 10 8 hrs.

Sept. 11 8 hrs.

Sept. 12 8 hrs.

Sept. 13, Paid.....\$18.00

Sept. 15 8 hrs.

Sept. 16 8 hrs.

Total hrs. 60@ 75c Sept. 17, Paid.....\$12.00

Total paid.....\$45.00

W. A. Brownfield @ \$1.25 per hour

1941

Sept. 2 8 hrs.

Sept. 3 8 hrs.

Sept. 4 8 hrs.

Sept. 5 8 hrs.

Sept. 6, Paid.....\$40.00

Sept. 8 8 hrs.

Sept. 9 3 hrs.

Sept. 11 8 hrs.

Sept. 12 8 hrs.

Sept. 13, Paid.....\$33.75

Sept. 15 8 hrs.

Sept. 16 8 hrs.

Total hrs. 75 @ \$1.25 Sept. 17, Paid.....\$20.00

Total paid.....\$93.75

Joseph Zelko @ \$1.50 per hour

1941

Aug. 28	.....	8 hrs.
Aug. 29	.....	8 hrs.
Aug. 30	.....	8 hrs.
Sept. 1	.....	8 hrs.
Sept. 2	.....	8 hrs.
Sept. 3	.....	8 hrs.
Sept. 4	.....	8 hrs.
Sept. 5	.....	8 hrs.
Sept. 8	.....	8 hrs.
Sept. 9	.....	8 hrs.
Sept. 10	.....	8 hrs.
Sept. 11	.....	8 hrs.
Sept. 12	.....	8 hrs.
Sept. 15	.....	8 hrs.
Sept. 16	.....	8 hrs.

 Total hrs. 120 @ \$1.50

\$180.00

Pat Devine @ \$1.50 per hour

1941

Aug. 28	.....	8 hrs.
Aug. 29	.....	8 hrs.
Aug. 30	.....	8 hrs.
Sept. 1	.....	8 hrs.
Sept. 2	.....	8 hrs.
Sept. 3	.....	8 hrs.
Sept. 4	.....	8 hrs.
Sept. 5	.....	8 hrs.
Sept. 8	.....	8 hrs.
Sept. 9	.....	8 hrs.
Sept. 10	.....	8 hrs.
Sept. 11	.....	8 hrs.
Sept. 12	.....	8 hrs.
Sept. 15	.....	8 hrs.
Sept. 16	.....	8 hrs.

 Total hrs. 120 @ \$1.50

\$180.00

 Total Labor.....\$498.75

(Joseph Zelko is one of the plaintiffs. Pat Devine has an interest in plaintiffs' business. Neither of them has as yet been paid for above labor.)

III.

In response to paragraph VI of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: Track pads on the traction track of the trencher were so badly bent that the traction would [21] break street pavement on the streets whereon the machine would work and hence said machine would not be permitted by the authorities to be on the streets. Links on the excavating chain were so badly bent that the excavation apparatus was completely out of alinement. For this reason the machine would not dig a trench on the center line, but the excavating chain would keep slipping off the sprocket gear, with the result that the machine could not be kept on the direct course. The shafts of the traction track were also bent and this made the machine go off line. The machine, in such condition, would not do one-half the work which the same machine, in an efficient condition, would do, and, consequently, more manual labor would be required for straightening out the trench and keeping it straight. Such extra labor would double the cost of the trenching when done by an efficient machine.

IV.

In response to paragraphs VII and VIII of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: Each time a pad on the trenching track became bent, it should have been repaired at once and such repair would constitute a minor field repair. Each time a link in the excavating chain became bent, it should have been immediately

replaced or straightened out and such would have been a minor field repair. It is apparent that these minor field repairs were not made at the times required and, consequently the machine became weakened and excessive load was placed upon it in doing what it would ordinarily do efficiently when in good condition [22] and repair. Moreover one defective part placed an excessive load on the other parts of the machine so that as a result the entire excavating chain and the entire traction track became bent and damaged beyond repair.

V.

In response to paragraph IX of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: The machine, when delivered to defendants, was in good, efficient working order and repair, as appears from the contract. None of the defects which existed when the machine was returned existed at the time of the machine's delivery to the defendants. When it was returned the defects were immediately apparent.

Dated this 12th day of November, 1941.

CONNER & JONES

By ARCHIE R. CONNER

303-6 Valley National Bldg.

Tucson, Arizona

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

Attorneys for Plaintiffs.

Copy received November 13, 1934.

JOHN P. DOUGHERTY

Asst. U. S. Atty and
Attorney for Defendants.

[23]

[Endorsed]: Filed November 13, 1941. [24]

[Title of District Court and Cause]

ANSWER

Comes now the defendants in the above-entitled case and make answer as follows:

I.

Admit the allegations contained in Paragraphs I to IV inclusive and deny each and every other allegation contained in the complaint herein.

Wherefore, the said defendants demand judgment dismissing said complaint with costs.

F. E. FLYNN

JOHN P. DOUGHERTY

Attorneys for defendants.
412 Federal Building,
Tucson, Ariz.

Received copy of Answer this 10th day of January, 1942.

CONNER & JONES

FRANK J. BARRY

Attorneys for Plaintiffs. cr

[25]

JPD:h

[Endorsed]: Filed January 10, 1942. [26]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated as follows:

That the attached list correctly reflects the cost of the labor and material employed in repairing the trenching machine involved in this case while the same was at Fort Huachuca; that paragraphs I and II of the Bill of Particulars on file herein correctly reflects the cost of the labor and material expended by the plaintiffs in repairing said machine in Los Angeles after its return from Fort Huachuca, but this shall not be deemed an admission by the defendants that all the labor and material set forth in said paragraphs were necessary to make the repairs required to place the machine in good order.

Dated at Tucson, Arizona, April 23rd, 1943. [27]

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Building,
Tucson, Arizona

Attorneys for Plaintiffs

FRANK E. FLYNN

United States Attorney

JOHN P. DOUGHERTY

Assistant U. S. Attorney

Tucson, Arizona

Attorneys for Defendants.

[28]

Parts & Time used on Austin Trenching Machine

Rented from Culjak & Zelko, Los Angeles, Calif.

By Del E. Webb Const. Co. & White & Miller Contr. Inc.

At Fort Huachuca, Arizona

Quantity	Description	Unit Price	Total
1 only	Adjusting Nut	3.47 ea.	3.47
1 "	Adjusting Screw	6.27 "	6.27
16 "	Sprockets	1.95 "	31.20
16 "	Wearing Plates	1.65 "	26.40
1 "	Clutch Center Plate	12.80 "	12.80
2 "	Clutch Driving Plates w/linings..	22.30 "	44.60
1 "	Adjusting Screw	1.53 "	1.53
1 "	Jew Clutch	13.30 "	13.30
1 "	Clutch Ring	6.35 "	6.35
1 "	Jew Clutch	13.75 "	13.75
1 "	Clutch Ring	7.20 "	7.20
1 "	Twin Disc Clutch Plate.....	15.40 "	15.40
4 "	Disc Clutch Springs .....	.15 "	.60
1 "	Driver Shaft	22.30 "	22.30
30 ft.	Baldwin Chain	1.80 ft.	54.00
2 only	Idler Rollers	9.00 ea.	18.00
12 "	Excavator Chain Links	4.80 "	57.60
7 "	Excavator Chain Bushings .....	.65 "	4.55
14 "	Excavator Chain Pins .....	.88 "	12.32
24 "	Excavator Chain Lock Pins.....	.07 "	1.68
36 "	Excavator Bucket Hanger Pins....	.30 "	10.80
2 "	Idler Rollers	9.00 "	18.00
29 ft.	20" 5 Ply Conveyor Belt.....	2.20 ft.	63.80
12 only	Excavator Chain Pins .....	.45 ea.	5.40
67 "	Excavator Chain Lock Pins.....	.04 "	2.68
36 "	Excavator Chain Links	2.45 "	88.20
24 "	Excavator Chain Bushings .....	.40 "	9.60
36 "	Excavator Chain Pins .....	.45 "	16.20
33 "	Excavator Chain Locking Pins....	.04 "	1.32
149 lbs.	Stoody Welding Rod .....	.14 lb.	20.86
17 "	Babbit .....	.47 "	7.99
12 ft.	30" Belting	2.40 ft.	28.80
12 only	Bolts	19.25 C	2.31
50 "	Bolts	14.30 C	7.15
50 "	Cap Screws	2.50 C	1.25
100 "	Hub Nuts	2.50 C	2.50
50 "	Nuts	2.50 C	1.25

Quantity	Description	Unit Price	Total
50 only	Screws	2.00 C	1.00
50 "	Nuts	2.00 C	1.00
12 "	Cap Screws	15.00 C	1.80
17.33 cu. ft.	Oxygen & Acetyline	1.84 cu. ft.	31.88
1 only	Steel Plate 14"x14"x1½".....	2.20 ea.	2.20
100 "	Screws for ditcher teeth.....	2.50 C	2.50
24 "	Alemite Nipples .....	.12 ea.	2.88
200 "	Washers 10 lbs. ....	.45 lb.	4.50
100 "	Bolts	15.40 C	15.40
			[29]
1 "	Hoist Screw	60.00	60.00
1 "	Clutch Ring	3.80	3.80
1 "	Bevel Gear	49.50	49.50
50 links	Excavator Chain	4.36	218.00
1190 only	Ditcher Points .....	.54	642.60
2 pe.	75' Cable 5/8" 6x19 S. S.....	15.60	31.20
100 only	H & L Shanks	2.75	275.00
4 "	Flanged Idler	9.00	36.00
118 "	Side Cutters	2.00	236.00
18 "	Side Cutters	2.75	49.50
72 "	Rooters	3.50	252.00
1 "	Clutch Shifting Ring	9.00	9.00
25 "	Chain Links	4.90	122.50
18 "	Side Cutters	2.50	45.00
12 "	Stan. Cutters	2.00	24.00
2 "	Sprockets	8.80	17.60
4 "	20" Buckets	27.50	110.00
28 "	Side Cutters	2.00	56.00
48 ft.	36" Conveyor Belting	3.74	179.52
1 only	Adjusting Screw—Buckets	6.65	6.65
1 "	Reverse Gear	54.50	54.50
1 "	Sprocket & Jaws	27.60	27.60
1 "	Bushing	4.20	4.20
2 "	Retaining Rings	4.50	9.00
1 "	Clutch Ring	4.20	4.20
1 "	Hoist Nuts	54.60	54.60
2 "	Conveyor Reverse Drive	48.50	97.00
1 "	Conveyor Drive Shaft	8.85	8.85
1 "	Bevel Gear	13.70	13.70
112 "	Teeth	2.00	224.00
25 "	Teeth	2.50	62.50
1 "	Hoist Screw	39.90	39.90
50 "	Excavator Chain link Pins.....	.06	3.00

Quantity	Description	Unit Price	Total
5 ft.	Rex Chain	1.92	9.60
1 only	Friction Shoe	22.50	22.50
1 "	Clutch Lever	3.00	3.00
1 "	Clutch Cone	5.15	5.15
1 "	Fan Belt	3.25	3.25
Sub Total.....			3,775.01

Date				
1/13/41	2	Hours Labor.....	1.375	2.75
1/18/41	4	" "	1.375	5.50
	12	" "	1.20	14.40
1/20/41	2	" "	1.20	2.40
	8	" "	1.375	11.00
1/21/41	8	" "	1.375	11.00
				[30]
1/22/41	8	" "	1.375	11.00
1/23/41	3	" "	1.20	3.60
1/24/41	3	" "	1.375	4.13
1/27/41	8	" "	1.375	11.00
1/29/41	2	" "	1.20	2.40
1/30/41	4	" "	1.20	4.80
2/10/41	4	" "	1.375	5.50
2/13/41	1	" "	1.20	1.20
2/14/41	4	" "	1.20	4.80
2/15/41	3	" "	1.375	5.13
2/20/41	4	" "	1.20	4.80
2/21/41	3	" "	1.20	3.60
2/25/41	5	" "	1.375	6.88
2/27/41	4	" "	1.375	5.50
3/ 1/41	12½	" "	1.20	15.00
3/ 3/41	2½	" "	1.375	3.44
3/10/41	5½	" "	1.375	7.56
3/11/41	8	" "	1.375	11.00
3/12/41	1	" "	1.375	1.38
3/17/41	3	" "	1.375	4.12
3/18/41	7½	" "	1.375	10.31
3/21/41	2	" "	1.375	2.75
3/24/41	2½	" "	1.375	3.44
3/25/41	4½	" "	1.375	6.19
3/26/41	3	" "	1.375	4.13
3/27/41	4½	" "	1.375	6.19
3/30/41	4	" "	1.375	5.50
3/31/41	5	" "	1.375	6.88

Date					
4/ 1/41	2	Hours Labor.....	1.375	2.75	
4/ 3/41	4	“ “	1.375	5.50	
	4	“ “	1.20	4.80	
4/ 4/41	24	“ “	1.20	28.80	
	11	“ “	1.375	15.13	
4/ 8/41	9½	“ “	1.375	13.06	
4/ 9/41	6	“ “	1.375	8.25	
	12	“ “	1.20	14.40	
4/10/41	4	“ “	1.375	5.50	
4/11/41	10	“ “	1.375	13.75	
	24	“ “	1.20	28.80	
4/12/41	16	“ “	1.20	19.20	
	6	“ “	1.375	8.25	
4/14/41	26	“ “	1.20	31.20	
	4½	“ “	1.375	5.50	
4/16/41	16	“ “	1.20	19.20	
	2	“ “	1.375	2.75	
Total.....			\$4,211.13		

[31]

[Endorsed]: Filed April 23, 1943. [32]

[Title of District Court and Cause.]

CONDENSED NARRATIVE OF TESTIMONY

Preliminary discussion and request by Mr. Jones for amendment increasing the amount prayed for in the complaint to include the aggregate of the amounts pleaded as damages in the complaint. Amendment resisted by Mr. Dougherty upon the ground that any such increase is not justified by allegations of complaint. Upon suggestion by Mr. Jones that evidence upon the matter be received under Rule 43, the Court inquired whether the trial might proceed with that understanding, to which Mr. Dougherty agreed but with the understanding that the complaint would not be amended to include the extra \$1500.00.

TESTIMONY OF MARTIN CULJAK

(a witness for plaintiffs)

Upon Direct Examination

By Mr. Jones:

My name is Martin Culjak. I live at 1354 South Bonnie Beach Place, Los Angeles. I am a citizen of the United States and of the State of California and a resident of the latter State where I vote. Mr. Zelko is a citizen of the United States and of the State of California of which State he is a resident. I [33] think Del E. Webb is a citizen of the State of Arizona, at least he was when the complaint was filed. Joseph Zelko and I are in the business of sewer contractors, a copartnership under the name of Culjak and Zelko. I was first approached by the defendants about leasing this machine the last part of November, 1940. A fellow by the name of Wear-ean called me on the telephone and asked me if I had a trenching machine to rent and I told him we did have one.

Mr. Dougherty: What is the object of this line of testimony in regard to hearsay testimony, a conversation with a person not here?

Mr. Jones: I think the Court ought to receive it and we will connect it up by showing a chain of events leading from that conversation to the contract and the leasing of the machine, but if we do not, your Honor will have to disregard it. We ask that it be received under Rule 43 temporarily.

The Court: All right, let it be received.

The Witness (Continuing): He asked where was

(Testimony of Martin Culjak.)

our place, and he and Mr. Morrison, of White and Miller, came up in the evening of the same day he called up. I had a conversation with them at that time. They wanted to rent a machine and asked what I wanted for it, and I told him I never rented the machine before, and what is a reasonable price, that is what we rent it for, and he said, "The size of this machine, the rent would be fifteen hundred dollars." Mr. Morrison, who I was told represented White and Miller, said that. I asked if there was any rock in the ground, and he said "No rock, but some hard clay, and I said, "If that is the case, I rent you the machine." [34]

Mr. Dougherty: Mr. Cavanaugh says that Mr. Morrison was White and Miller's agent.

The Witness (Continuing): Then he asked if I would let them have the machine and I said I would. They said they were going to use it at Fort Huachuca, but of course I did not know where Fort Huachuca was or anything. I relied upon their statement about the rocky ground and absence of rocks. He said they would pay transportation to Fort Huachuca from the yard and back to the yard, and pay rental from the time the machine left the yard until it came back to the yard. I asked about the parts and stuff like that. They looked at the machine and I asked what shape they would bring the machine back in, and they said it would be in the same shape as it is right now. They said any repair parts that were needed they would take care of.

(Testimony of Martin Culjak.)

Mr. Dougherty: I wish to interpose an objection. This lawsuit is confined to the allegations in the contract?

The Court: Yes, I think it is.

Mr. Jones: I think ordinarily that is true, but I think the rules permit you to show the negotiations that led up to the contract, particularly without a jury.

Mr. Dougherty: As I understand it, the contract speaks for itself, but if there is any question about the interpretation of the contract, then evidence might be introduced for the purpose of interpretation.

Mr. Jones: [35] There is a question about the interpretation, bound to be, and I think the Court can receive the evidence of negotiations leading up to the contract in order to ascertain what the parties mean by the terms of the contract. In any event, it is all in, and if it is improper, the Court will disregard it.

The Witness (Continuing): They took the machine. There was no written contract signed at the time. They took it the first of December from the yard. I got the contract about a week or ten days afterwards.

We owned the trenching machine about 12 years, but it had not been in steady use for 12 years. I would say it had been in steady use about 10 or 11 months prior to the rental to Fort Huachuca. I mean by that that the period of 10 or 11 months was spread over the 12 year period and that during

(Testimony of Martin Culjak.)

that time, we never used the machine any day for more than one shift of 8 hours. The reason we did not use it more was mostly on account of the depression, as there was no contract work. During all that time it was kept in first-class condition by Mr. Devine who had taken care of it ever since we had it.

The machine with the extra parts cost about \$24,-500.00. When rented to the defendants it was in first-class condition.

(At this point plaintiff's Exhibit 1 was received in evidence, being specifications containing pictures of a trenching machine of the Austin Machinery Company of Muskegon, Michigan.)

The Witness (Continuing): These specifications No. 2013, Austin trench machine, effective May 1, 1929, are specifications and pictures and descriptions of the machine we rented to the defendants. The weight of the machine was 40 tons. This is an excavator chain link. (Indicating) It is on Sheet No. 6. We call it the excavator bucket chain. The chain links are for the purpose of holding the [36] bucket line that excavates the trench. I have one of those chain links here in the courtroom. (Witness produces it) I would say it weighs about 10 pounds. The links are made of the materials described in those specifications there, on Sheet No. 1. (Indicating) These are the chain links of the chain on the boom. This is a boom and there is a chain line on each side of it connected with buckets.

(Testimony of Martin Culjak.)

They call them 18-inch buckets. They are about 16 inches inside, but 18 inches overall, and they are called 18-inch buckets.

Mr. Jones: If the Court please, I do not think we shall offer these in evidence. They are very heavy. But I should like your Honor to take a look at these links.

The Court: As I understand, the allegation of the complaint is that they were torn out of shape?

The Witness (Continuing): Some are torn and some bent. The traction pads are pads underneath the truck. Here is where the traction pads are. (Indicating)

There are 82 traction pads on the machine, 41 on each side. They were in first-class condition when the machine was rented to the defendants, never showed any wear on them at all. They had been used in the City of Los Angeles and County of Los Angeles 10 or 11 months, 8 hours per day at intermittent periods during the time we owned the machine. It had not been used on rough ground or on hard ground of any kind. The machine had been used around Los Angeles. We never ran into any hard soil at all.

There were 180 excavator links in the chain. I have one of those traction pads here. On Sheet No. 4 is the picture under the heading "Multipedal traction" of these traction pads. They [37] are called by different names, multiple pads, traction pads, treads, slats, cat pads. (Witness produces described pad)

(Testimony of Martin Culjak.)

Mr. Jones: Likewise, I won't offer this in evidence, but I call your Honor's attention, and counsel's, if I may, that at the ends here, (Indicating) it is wood and the rest is encased in steel, I presume.

The Witness (Continuing): This pad is 24 inches long. It weighs somewhere around 50 pounds. The wood goes through the entire length of the pad; it is just a support of the steel casing which is called the channel iron. This one I have produced is in good condition. When the pads are in good condition these caterpillars of this trenching machine can run over a pavement without damaging it. They are designed for that purpose. Before the machine went to Fort Huachuca it sure could run over pavement without injuring it. We had 35 miles of sewers in Los Angeles and never a pavement we used it on was injured. It did not damage the pavement in any way.

When I spoke about the machine being in first-class condition, that applied to all of its parts, buckets and everything, every part of the machine. Before the machine was sent to Fort Huachuca it worked in first-class condition.

After it was sent to Fort Huachuca and we signed the contract, the next I saw it was the latter part of April 1941 at the Southern Pacific freight depot. There was a fellow by the name of Brownfield representing the defendants with it. I did not make an inspection of the machine at that time. I just glanced over it. I could see all the chains were bent and the buckets shot and I could see it was not

(Testimony of Martin Culjak.)

right and I asked Brownfield about it, and he said, "Well, there is nothing I can do about it." Mr. [38] Devine made an inspection of the machine for me. I saw these multipedal pads on the machine. They were in bad condition, pretty well shot. The wooden blocks inside were all stripped and that iron cover on the pads was all bent in different directions.

I noticed the buckets were all patched up, welded up, and I saw a lot of loose rivets on the caterpillar links. They were pretty well bent and stretched and out of shape. When they are bent or stretched the machine does not operate. It loses its pitch and the two do not mesh in the chain. The defendants had Mr. Harry C. Collins make an inspection of the machine for them. He made that inspection in North Hollywood, Los Angeles, when the machine was in our possession.

We bought 82 track pads.

Before Mr. Collins appeared, I wrote a letter to the defendants about the condition of the machine and explained it to them. I wrote and mailed the letter May 7, 1941.

(There being no objection, a carbon copy of said letter was marked plaintiff's Exhibit 2 in evidence and reads as follows:)

(Testimony of Martin Culjak.)

May 7, 1941

Del E. Webb Construction Co. &
White & Miller Contractors, Inc.,
Fort Huachuca, Arizona.

Gentlemen:

On arrival of our Austin Trenching Machine Model 500- Serial #11346, we have found that the excavation chain has been so badly bent that it would not pay to repair it for use again, and we also find that the troweling track was so badly damaged that it would require a new track.

At the time Mr. Morrison was talking to us as [39] to the renting of said Trenching Machine, he told us that there was no rock in the job where the machine would be working, and through the records of the employees who had been working on the said job we find that there was plenty of rock, and due to this rocky condition the track was badly damaged and would require a new track.

Will you please see that we get this excavation chain and troweling track as early as possible. There are several other things that we will have to repair on said trenching machine to put it in workable condition, but we are over-

(Testimony of Martin Culjak.)

looking all those things if we are going to get this excavation chain and troweling track.

Very truly yours,

CULJAK & ZELKO

By -----

Co-partner

MC/MS

Where, in this letter, I speak about the troweling track, I refer to these track pads, of course, but we call it different names. It is well understood that I was referring to the pads there. I said that there were other things wrong with the machine, but that if we could get the links and pads replaced, we would overlook that.

The last part of June or the first of July, they notified us they would not make the repairs. I then went to our attorney and asked him what was the best thing to do, I mean to Mr. Frank J. Barry in Los Angeles. He said all we could do was buy the parts and put them in and pay for them, and if they would not pay for the repairs to take them into court. We gave an order [40] for the parts to Harry C. Collins, who represents the Austin Machinery Company, about the 7th or 8th of July, just orally and he accepted the order. I do not recall hardly any parts being bought for the machine from 1930 to 1940—no links that I remember. I had quite a lot of extra chain because we had the machine rigged to dig 35 feet and we had to buy the

(Testimony of Martin Culjak.)

extra new chain. The boom could be elongated so as to dig a deeper ditch than at Fort Huachuca.

Mr. Collins was not able to fill the order until the last part of August. We got from him the track pads and the excavating chains and some pins and bushings for those links and idler shafts. We bought those idler shafts because the ones in there were bent so bad we could not use them. They had been bent while in use by the defendants under this contract. I remember those excavator chain links were \$4.90 each plus sales tax. We actually put 180 links back in that chain. When the machine was sent to the defendants it had the same links as we put back on there to dig a 15-foot ditch; it could not be any less than 180. Although we listed 150 in the bill of particulars, actually we put in 180. The 30 links we had in stock were brand new, never used. When you lawyers put in there 150 you should have put in 180.

Mr. Jones: That is our fault. I shall ask to have an amendment for that. I think we shall prove conclusively it is 180.

This stipulation refers only to 82 multiple slats and bolts, \$1199.33. That is all the stipulation goes to.

Mr. Jones: Yes, they admit the links but the point is we only put 150 links in there and we should have put in 180. That is the [41] size of it.

The Witness: As to that item of \$33.77 for work done by Pioneer Blacksmith and Welding Company—They were cutting these bolts on these slats, the

(Testimony of Martin Culjak.)

bolts that hold these chain links; the bolts that hold the chain links that travel on the track. We had to burn the bolts off. They were so bent we could not get them out and had to burn them. I do not know where they were bent. I did not do the work myself. They were not bent when we sent the machine to Fort Huachuca and they were bent when they came back.

It took us about 30 days to repair the trenching machine.

John Arandel worked on the machine 60 hours at 75c per hour. That was a fair wage for the work he did at that time. Since then it would be more. W. A. Brownfield worked on the repair of the machine 75 hours. It was necessary that he work those hours. We paid him \$1.25 per hour. The reason we paid him more than we paid Mr. Arandel was that he was operating a backfiller for us and that was his pay at that time, the union scale for backfiller operators. The job was really \$1.50 per hour for repair work, but I paid him only \$1.25 because that was what we paid him on the backfiller. Mr. Zelco was paid \$1.50 per hour for the 120 hours he worked on this machine. He was one of the partners. His work was worth much more than \$1.50 per hour, but we only charged that. It was worth more because instead of putting in 8 hours he put in 10 or 12, and we charged only for 8. That work required skilled workmanship.

Pat Devine worked 120 hours at \$1.50. It was necessary that he do so. The wage of \$1.50 per hour

(Testimony of Martin Culjak.)

was proper and reasonable for him. We used that trenching machine after we got [42] it back, about 9 or 10 days, on a deep sewer along Long Ridge Avenue. It was used on that job about 2 days of 8 hour shifts actual work. On two jobs we used it 9 or 10 days, but on the Long Ridge job about 2 days. The other job we used it on was the Norwalk and Magnolia Boulevard job. That was a sewer job, through a private subdivision. Practically both jobs were the same, pretty nice digging, could not find any better digging, sand and clay mixed together.

We discontinued the use of the machine because we could not use it on any job that had pavement on it and could not use it on those jobs economically because it pulled off to one side and we had extra work to get the ditch right. We could not use this machine on a job where there was pavement because if you put it on light pavement the multiple track pads would dig up the pavement because they were all bent and they dug up the dirt.

After we found we could not use the machine, we did nothing except wait for the parts and try to get it fixed.

We could have rented the machine in August to a man named P. J. Artucovich and to Beback and Brackedge for \$1600.00 per month while we were waiting for those materials and parts to arrive. It would have been worth that much if we had used it ourselves, if it was in good condition. I had several calls for it. The damaged condition of those pads

(Testimony of Martin Culjak.)

and parts and of the excavator links could not have been caused if the machine had been subjected only to normal use.

In my opinion, the machine was subjected to some extraordinary use down there.

A man by the name of Nottingham also called me up and wanted to rent the machine. There would have been no trouble at all to rent it at \$1600.00 if it was in shape. [43]

Cross Examination

By Mr. Dougherty:

We purchased this machine in 1930. It was not brand new. It had been bought two or three months before. We bought it through Collins. I could not say how long it had been used before we bought it, but it was very little. It had been used at Belvedere Gardens in Los Angeles by George Mitchell.

We paid \$24,000.00 for the machine and extra parts, consisting of 36 inch buckets and idler shafts and rollers. I could not tell you offhand without checking my books what that amounted to, probably around \$2,000.00.

We first operated the machine in 1931 at Van Nuys, being in a sewer ditch. It was there 60 days. We did not use it after that until 1938 when we used it about 20 days in the town of Tehachapi in California 25 miles from Los Angeles. I cannot recall where we next used it. I do not keep track of the different jobs to tell exactly what job I went from one to another. I had a few little

(Testimony of Martin Culjak.)

jobs here and there. We had it about 14 or 15 months before we used it and then we did not use it until 1938 when we used it at Tehachapi.

I would say we did not use it more than 3 or 4 months from 1938 to 1940. Then in 1940, it was sent down here to Fort Huachuca some time around December 1st.

Since September 16, 1941, we had a job in Lancaster. We started that job the first of March 1942. That was the first job we had after September 16, 1941, and lasted about 20 days. We next rented it to William Simpson Company in San Diego about June 1942. It remained there about 2 months. We next had our own job in the County of Los Angeles at Olympic Boulevard and Server Avenue—where we operated about 15 days. We then took it to Ivis, California where we operated it 2 weeks. The next job was Camp Young where we took it in March 1943 for 2 weeks and 4 days. From [44] there we took it to the yard in Los Angeles where it still is. From 1931 to 1938 it was in the yard in Los Angeles. It is a closed yard with a shed to put the trenching machine in. At the time we repaired it we had 30 new links in our possession that we put on it. We got those links with the machine when we bought it in 1930. We had them all the time since we purchased the machine and did not put them on until in August or September, 1941. We made other repairs on that machine from April 17th when it was returned from Fort Huachuca until August 28th when we

(Testimony of Martin Culjak.)

overhauled it. We had to overhaul the transmission, the gears of which were all stripped. We did that job in Santa Monica. Of course, I can not keep all of those jobs in my mind. I skipped that job. We did this transmission after we put in the track pads after September 1941. I do not remember making any repairs on the machine from the time it was returned from Fort Huachuca till we started to overhaul it in 1941 the last part of August.

Our backfiller has been used in making repairs to that machine, but was not in Fort Huachuca. The item of \$33.77 in our bill of particulars to Pioneer Blacksmith and Welding Company is for cutting bolts on those multipedal pads.

It is the frame that holds the track that was cracked and had to be welded.

The Court: How much is that?

Mr. Jones: \$33.77. In other words, we used the wrong words. That was for cutting off the bolts. They were twisted and bent and they had to cut them off. It was \$33.77. We must have picked up the wrong words.

The Witness Continuing: [45] I testified to having paid Mr. Joseph Zelco \$1.50 per hour. Those are not top wages for that kind of work. \$1.62½ is top. We paid him \$1.50.

Joseph Zelco is a mechanic. He had a lot of mechanical experience before he went to contracting. Since he has been associated with me in business, he has worked with Mr. Devine on this particular machine and backfiller and such stuff as

(Testimony of Martin Culjak.)

that. Brownfield is not a first class machine man. He is an operator but not first class by no means in either line. He can get by when you can't get anybody else. He is not the mechanic or repair man that Zelco is.

Plaintiff's Exhibit I contains a true description and specifications of the same type of machine as this trench machine, but not this particular machine.

Regardless of what the picture shows, it takes 82 pads to put it in shape. This diagram may be different from the machine itself. They kept the machine on the Fort Huachuca job from December 1, 1940 until about the 16th or 17th of April, 1941. The total amount of rent received was \$8225.00 while the machine was at Fort Huachuca.

We ordered the repair parts, the multipedals and the chain links in July, 1941, around July 8th. I am pretty sure it was right about that time. I have no records with me. I know it was earlier than July 28th, about $21\frac{1}{2}$ months after the machine was returned to us. It was returned earlier than April 28th. I could not recall the exact date. It was put on the Long Ridge job. I did not keep the records of its having been kept there until May 7, 1941. It is probably true that it was removed to the Magnolia Boulevard job on May 13, 1941 and remained there until June 11, 1941. I could not recall the date. It is probable it was returned to the Long Ridge Avenue job on June 30, 1941 and [46] re-

(Testimony of Martin Culjak.)

mained there until July 2, 1941; as I say, I can not recall the dates. I testified there were 180 links in this chain. It could not be that there were only 68 links because we ordered 150 new ones from Collins and when we put the chain together it was 30 short. Harry Collins was the man who sold us the machine. He is engaged in the business of selling those machines and repair parts and has been for years.

Collins made an inspection of the machine about between the 15th and 20th of May. This multipedal pad we brought over here is a part of the multiple pads that were on the machine before it was sent to Fort Huachuca. That pad was not on the machine while at Fort Huachuca; it remained in our yard. We took one off of each track. There were 84 on there before and we took two off, so it had only 82 on it when it went to Fort Huachuca. The track is adjustable. You can take off a pad or put one on.

Q. Now, the pad you showed us here was pretty well cracked, was it not?

A. I did not pay no attention whether it was one we took off or one that was cracked. I could not tell you. That multipedal pad is, I expect, in the same condition as the other pads that were on the machine when it went to Fort Huachuca and is a fair example of the condition of the pads when they went to Fort Huachuca. We took these two pads, one on each side, off the machine so as to take the slack off of the track. That

(Testimony of Martin Culjak.)

does not mean that it was worn; it was not worn. The track itself was loose when we first bought it. It had too many pads on it. That was the reason, my operator told me, for taking them off. I could not tell, because I did not operate it myself, whether he operated it from 1930 to 1940 with the full number of pads or not.

Redirect Examination [47]

By Mr. Jones:

I spoke about overhauling the transmission and said that the gears were all shot. The transmission shaft was cracked; it was only about a quarter of an inch on the bottom, and had a crack the rest of the way, and there were three gears and they were all stripped. That condition arose about two or three days after we put these pads on the escalating chain. The shaft had been cracked during use in Fort Huachuca.

The overhauling was due to the condition that had been created there at Fort Huachuca. The expense in connection with that overhauling, the labor and material would run to about three hundred to four hundred dollars. I could not say exactly. I said we waited 21½ months before we actually ordered the repairs. We waited that long because Collins was taking the matter up with Del E. Webb Construction Company and White & Miller, and he did not hear from them as to whether they would do it or not, and I could not do anything until I found out what they would do about it.

(Testimony of Martin Culjak.)

I wrote them on May 7, 1941 and in that letter I asked them to take care of the damaged condition of this machine. Then Collins made the inspection. I heard from Collins the last part of June that they would not make the repairs. I then employed an attorney from Mr. Barry's office, on the 8th of July when we were at Mr. Barry's office, and that was when I gave them the order. I did not get a written confirmation of that order from Mr. Collins. I know he told me he had ordered that stuff, but could not say whether he actually confirmed it by a letter to me or not. In addition to my letter of May 7th, Mr. Barry wrote the defendants a letter demanding that they take care of this situation. That letter was written on July 8th, the day I was in his office. [48]

Re-Cross Examination

By Mr. Dougherty:

I did not mention the amount of three or four hundred dollars worth of repairs put on the machine after it had been overhauled in September. I did not mention that amount in any of my letters because it was not overhauled at the time and I did not know anything about it at the time we demanded this money. The damages I first stated in my letter of May 7th I did not care for anything else except to get those parts. I made those extra repairs the last part of September, after the 16th of September, and I did not discover that damage until that time. We know where the in-

(Testimony of Martin Culjak.)

jury was done as a matter of fact. The shaft itself showed an old rusted crack, and there was only about $\frac{1}{4}$ of an inch holding it. It was not crystallized. It was an old crack with rust in it. We could not discover it at the time the machine was first returned to us because it was encased and you could not see it. I did not mention this damage in our bill of particulars.

Mr. Jones: We do not make any specific claim for that, except in that \$1500.00 for general damages.

TESTIMONY OF PAT DEVINE

(a witness for plaintiffs)

Direct Examination

By Mr. Jones:

My name is Pat Devine. I live in San Gabriel, California. I am a citizen and resident of California. I am a trenching machine operator. I am 60 years old. I have been a trenching machine operator since 1912. I have worked practically with all trenching machines since 1912. I have operated this machine involved in this case. I, chiefly, operated it. Pete Liles also operated it for about 2 months. I remember when plaintiffs bought that machine. I think it was in 1930. It could be new and secondhand both when bought because it was used [49] a very little, about six weeks. The first purchaser who bought it could not make his

(Testimony of Pat Devine.)

payments. This is the first type of machine I ever worked on, the Austin trenching machine. I operated this particular trenching machine on 3 jobs, or something like that from the time they got it. The first place we operated it was in Van Nuys about April 1930, I believe. At that time, we operated it about 6 weeks. After that, there were a few minor jobs in between that and 1938. I did not work at all with trenching machines between 1930 and 1938. In 1938, I worked with it again in Tehachapi for 21 days. After that, it came back to the yard and I put it under the shed. All the work it did before we sent it to Fort Huachuca was the job in Van Nuys and a job in North Hollywood and another little job somewhere else down in Buena Park.

It is hard to tell the sum total of the time the machine worked in that period. I know it would be less than a year. I would say that that machine was used to the extent or equivalent to one shift of 8 hours per day for about 10 or 11 months, something like that, from 1930 to 1940. From my experience, I would say that machine had a life of 25 years. I would say the multipedal pads had a life of 75% of the life of the machine, something like 20 years. I mean with normal use. I worked one Austin trenching machine a little lighter than this 11 years and we never changed pads. They are the same design of pads. This other machine was operated on some good and some fairly hard clay, black adobe and red adobe and various kinds

(Testimony of Pat Devine.)

of soil. It was not adapted to work in hard ground with rocks and boulders in it. The machine can not be operated against ground as hard as the buckets because the material is just as hard as the buckets. Slate rock you can operate in. But you can not dig hard rock. I have been on several jobs where we took [50] off the track and put on a hoe and shovel. I did not mean a hoe operated by a man by hand. The whole boom drops in the ditch and you can lift a log three or four tons heavy.

Q. Was this a machine operated hoe?

A. It is a power shovel with the boom the opposite way. At the time the machine was rented, the pads looked alright to me. Of course, there were weather checks in the end of them. I inspected the machine two days before it was shipped to Fort Huachuca. At that time it looked like it was in first class shape. When I speak about operating it, the number of men we have besides the operator depends a lot upon the ground, what you are doing. If it is ground where you are likely to run into rock, you should have a couple of men in the back watching for rocks, and there is a bell to pull to tell the operator to look out for them or to slow down or pull out the clutch.

The operator himself cannot see where the trenching machine is digging. He needs a man on both sides. In soft ground you need just one man to shove in the loose dirt along the side. The smooth-surface pad which my attention is called to was one of the pads in that machine. I took it out

(Testimony of Pat Devine.)

myself after the job in North Hollywood because there was a lot of slack in the track before the machine was taken to Fort Huachuca. I took out one pad on each side, leaving 82 pads. All the pads were in the same condition as that better pad.

That pad is about 10% worn. It is a good pad. Comparing it with the other pads on that track, they were the same. At that time they were alright. The condition of that wood in the end is that it is weather-checked and maybe this bolt is too tight. It is riveted on both sides. That is more a weather-crack than anything else, a weather-check. It does not run all the way through. [51]

That wood is oak, specially prepared oak pressed under heavy pressure before it is put in. The purpose of having the wood in there is as a filler for this channel iron. It takes up jars and the like and acts as a shock absorber to some extent. Now, when the machine came back from Fort Huachuca, I took out this pad my attention is now called to from the machine. This second pad is wore out. The wood is all cracked up and spread too wide. When the pads lay flat on the surface, they buckle together, one against the other. That is due to the spread of this. (Indicating.) It is too wide. There is no play at all between the two pads. They fit right together on the surface.

This pad is all dented and will cut up the streets.

To use it on dirt surface you would have to build the filler in here and bring it up to its pitch.

(Testimony of Pat Devine.)

You can not use it on pavement because it would cut up the pavement. The weight comes up here. You can see where the weight of the whole machine came. That would cut up the pavement. Whatever value that pad has now is whatever you can get for it for junk, because you can not straighten this out.

As to the condition of the other 81 pads when the machine got back from the defendants, I think 65 of them would fall apart. They were mostly worse than this, but some may be a little better. I had to have a whole pile to get one I could bring together.

The condition on that pad is not due to normal use. The use that would bring about such a condition is loose rock, rock here and there, or a boulder projecting out of the ground. I mean when the machine is traveling on its own power.

In traveling across rocky ground with a machine of that sort, you should either clear them away or plank it. It [52] is not prudent or good operation to run a trenching machine over rocky ground that will produce a condition of that sort. Here is a link that worked all the time, practically since we got the machine. It is manganese steel casing.

This link I have here in my hand is alright, but out of balance I would say. I could not very well use it in the efficient operation of this trenching machine. She loses her pitch from the sprocket wheel. In place of the sprocket coming back here and catching on here (illustrating), it comes over

(Testimony of Pat Devine.)

here and buckles over, and this all bends down here like that. The link has been so warped it does not engage the sprocket right here between the links. You can not take a manganese steel link and repair it. The sprocket wheel catches there in the heel. There is a pin that goes in there. Here is the bushing. It is braised on there.

When we got the machine back in April 1941, I saw it and inspected it. I have testified as to what I found with reference to the multipedal pads. The condition of those links as compared to this one which I have said was defective and non-usable is that they were practically all the same.

There are 180 links on the machine. There were not many of them good. A lot of them would look like a good link but you would have to tap them to see whether they were fractured or not.

That can not be detected by a casual examination of an hour. You would have to tap the chain with a hammer. I did that. You could use 9 or 10 of those on a new chain by changing the pins and bushings. That is 9 or 10 out of 180 could be used. In my opinion, as an expert in the use of these machines, I would say that the condition I have described was brought about by the rocky condition. If the machine were operated in proper ground they could not all be in that condition. Here are the two chains, and if this chain came apart and the pin came out, and she drags [53] the bucket over, it would bend the link. Rocky ground, surely rocks there, nothing else would cause this damage.

(Testimony of Pat Devine.)

Brownfield delivered this machine to us. I understood he operated the machine at Fort Huachuca. I was down at the depot to take the machine from the train and for about 11½ hour I helped and I said, "Brownfield, this machine got an awful beating," and he said, "You are lucky you got it back like it is."

I discussed the pads with him. He said he told Mr. Cavanaugh that we would not accept the machine the way the pads and the buckets were, the condition they were in. I discussed the ground with him. He said it was rocks, all rocks. I discussed the links with him. He said some days they would put in 4 or 5 links a day for the broken links.

I never broke that type of link. From the time the plaintiffs bought this machine to the time it was sent to Fort Huachuca, there were no pads put in and no links bought, and during the operation of the machine, as I said at least 10 or 11 months, we had no need to put in additional links. Brownfield, who delivered the machine to us, is the man who was operating the machine at Fort Huachuca. I also found the upper structure of the boom hanger had been pulled down. On Exhibit I, that is where she hangs on the boom. There it is right there at the top of page C-5. (Indicating.) The effect on the boom was that one side pulled down more than the other and throws the tail block 3 inches off from the center of the ditch. That condition in

(Testimony of Pat Devine.)

that boom was not there when the machine was sent to Fort Huachuca.

Mr. Dougherty: We object to this line of testimony for the reason that there is nothing in the bill of particulars referring to damage to a boom hanger. [54]

Mr. Jones: But, if the Court please, as we said this morning, the complaint alleges, first with respect to the pads and the links and their cost, and the cost of putting them in, and installing them. Then it alleges the loss of use for one month, and then this further sum of \$1500.00 which we did not include in the amount of the prayer.

(Here a discussion between the attorneys for the respective parties and Court occurred, the substance of which was an objection on the part of the attorney for the defendants to the introduction of evidence of damages not specifically pleaded and not set forth in the bill of particulars. The Court granted the request of the attorney for the plaintiffs to amend the complaint to allege such damages, but stated that if such an amendment should be made, the court would grant a continuance to the defendants. After consultation by attorneys for plaintiffs with clients, Mr. Jones announced that the plaintiffs would prefer to have the case go on. Thereupon, the Court sustained the objection to any testimony as to such damages not particularized by the bill of particulars. Whereupon, with permission of the Court, Mr. Jones made the following offer of proof:

(Testimony of Pat Devine.)

Mr. Jones: We propose to prove that over and above the cost of the excavator links and the traction pads and the installation and the idler shafts mentioned in the bill of particulars, and also that little cutting job, that over and above that this machine was damaged in the particulars we shall mention, namely, the buckets and this boom he talked about, the boom on the machine, and in several other particulars which I cannot recall but to the extent of at least ten or eleven per cent of the value of the machine on the basis of the contract price of twenty thousand [55] dollars, and on that basis we thought we were entitled to an additional fifteen hundred dollars.

The Court: Of course that is an item of such importance that if it is not incorporated in the pleadings, and you ask to amend in that respect, I would have to grant a continuance if the amendment was insisted upon.

Mr. Jones: The objection to that will be deemed to be sustained?

The Court: Yes.

The Witness (Continuing): After the trenching machine came back from Fort Huachuca, it was used by the plaintiffs. I operated it in Long Ridge Avenue and in Van Nuys. I was there about 2 days, I guess. The ground was soft solid loam. I operated the machine there, but not very efficiently because the track pads would buckle up like this, (Illustrating) and the cat roller would come up and it would slide and it would go to the front end, pull

(Testimony of Pat Devine.)

off of the line for you. It pulled out several times and I had to go back up and straighten out before I could go ahead.

I took every other tooth out of the sprocket in order to give it a slack, so it would not buckle up, and even if she would, I could handle her. It was a 6 point sprocket, 6 flat points, and then a square point, and the teeth are in the square point, and by taking the teeth out, I gave it slack.

The sprocket was supposed to have 6 teeth in each for proper use. There were 12 on and I cut it down to 6. Then with the 6 teeth in the 2 sprockets, she jumped a sprocket twice on me. If the links were right she would not jump the sprocket.

With respect to taking that trenching machine over [56] paved streets in Los Angeles or anywhere else, in the condition those pads were, they would not let you go over the pavement at all. Before the machine went to Fort Huachuca, you could have taken it over the pavement in its then condition.

The width of the machine is 14 feet and if the pads cut up the pavement, you would have 8 extra feet of pavement to replace. I mean by that the ditch is 2 feet wide and what you break up you have to replace. The machine would break up any pavement up to 2 inches thick. It could be operated on a concrete street but not on an oiled street.

It would not make a true straight trench. I slacked the chain off of it and put on 2,000 pounds in front as a counter-balance on the front end, to

(Testimony of Pat Devine.)

try to hold her in line. That was necessary to keep the front wheels from sliding and also I put grabs on the front wheels.

When one track is locked, she will pull away—too much pressure on one side. That was due to the damaged condition of these pads. The machine was repaired some time in September. I know that 150 links were purchased by the plaintiff from Mr. Collins. I know that 180 were actually put in the new chain. The extra 30 links they took out of stock that had never been used. There was no depreciation on those; they were painted and in a dry shed.

The machine was kept from 1930 in a galvanized shed well protected. I was sick for several years, but I would go around there and fool around. I was not in their constant employ during those years. When I set it up there I planked up the tracks with 12 inch planks.

I testified there were 10 or 11 usable links in the chain; they could be used with an old chain. We did not use them because you would be using an old link against a new one and [57] would have to take out the bushing and get new pins. In doing that, the question of labor involved would be an even break. The bushing is braised in with several thousand pounds. If I had taken the 10 or 11 links out and put in new ones, I think the cost would be greater than for the old links.

The old links were in various places and not all together and there would be considerable labor and expense taking them out. Those links came from

(Testimony of Pat Devine.)

Collins in 20 foot sections. We put in the various sections together. I think the 30 links that were in stock were in a 25 foot length. I took 25 and picked out 5 more from another piece of chain and hooked them up. Brownfield and Zelko and me, and Aranbel worked on the job in putting in those links. I bossed the job. I could not say as to the number of hours Aranbel worked, but I do know he was there a long time. I was there before him. Zelko took the time.

Mr. Jones: The stipulation takes care of that. Isn't that right?

Mr. Dougherty: Yes.

The Witness: The work done by Aranbel was necessary and so was the work done by all of us. It is a hard job to take those tracks off and put them in. We would have to have more men than that if I did not have the crane there. We did not rent a crane for that. They have a crane of their own.

Mr. Zelko himself worked on the job. He is a boilermaker by trade and he did all the hard hammering. They paid him for 120 hours. As to whether \$1.50 per hour is a fair wage for me, I got more than that for operating. I got \$1.62 $\frac{1}{2}$ per hour. Brownfield worked on the job. I guess \$1.25 per hour was the schedule of wages for him. You have to pay whatever the schedule [58] of wages calls for. I guess that was the schedule.

Those old links are all there in the yard, piled in the shed. I guess they may be of value as junk.

(Testimony of Pat Devine.)

I don't know. It is very cheap salvage. Manganese steel hasn't much salvage value. The condition of those pads and links and idler shaft was not due to normal wear and tear and use of the machine. The damage to the pads was caused by the rocky right of way, and the pads were injured because of contact with the rocks.

We could not braise the shaft off with hydroelectric power. We had to have a welder cut it off. They would not turn at all when the track was moving. The whole track was sliding over it.

In my opinion, the cause of the damage to the chain links was breaks in the chain and rocks sticking out from the side of the bank that would bend the chain. Those links are not cast. You cannot heat manganese steel. They are like Babbitt metal. you cannot even fire them. You have to saw them with a hack saw. As to being brittle, they are very thin, the thinnest steel there is. You can not repair them. You cannot put it back like it was. The idea in making such a thing is that it takes a lot of wear. It is the next thing to case-hardened.

I said that in the actual operation of the machine in that condition, the trench would not run true, because you would never know. The least little hump in the ground and the pitch is lost and it is off an inch and the next is off an inch. When they are on the top, they are together about like this. (Illustrating) As to increasing the cost of operating the machine, you have to take the machine out of the ditch when you get off the line and straighten

(Testimony of Pat Devine.)

it out again. It would take 10 or 15 minutes to get out of the ditch and straighten it out.

The ground was no digging at all, just like air, just [59] pulling the dirt out. With the pads in that condition, there was no possible chance to operate efficiently.

As to the fair rental value of the machine in the summer and early fall of 1941, they even get around \$1500.00 a month. I know one man asked me about renting the machine during that time, Mr. Nuttingham. As to whether \$1500.00 is a reasonable rent for that machine, I owned a trenching machine of my own at one time, and I even got more around 20 years ago than they got. I used to get 25c a foot where they got 15. The number of feet you dig in a day depends on the soil. Where I dug in Camp Young, for the 348th Engineers, I would average 2,000 feet a day.

I would say that \$1500.00 or maybe \$1600.00 would be alright as rental. There is no profit in that because I know from experience.

Cross-Examination

By Mr. Dougherty:

For this investment, that is only about 10% on that investment. I mean 10% on the entire amount on that investment. On the entire amount of rent it would be better, but when you get a week or a month or 2 months, it is not so good, and you take that into consideration at the time you rent the machine. I have been working for Culjak and

(Testimony of Pat Devine.)

Zelko since 1927. I did not work for anybody else, but I did not work steady. I was mining for a couple of years. I knew they had no work for a couple of years. I was ill 3 or 4 years. I did not work for them then, but I did come down and go over that machine and see that it was in good shape. I was not paid for that. I had nothing to do and I liked to go down and look it over.

I was interested in the partnership when they first purchased the machine. I did not sell my interest. I still have [60] it. So, I am a partner in the machine, but not in all jobs. I have no profits in the machine because before, when I was sick, I was not there and did not derive any profits.

I testified that I operated the machine at Long Ridge for about 2 days. We had that machine there about 10 days, but we moved it from there over to Magnolia Street where it was about 6 or 7 days. We moved back to Long Ridge again on June 30th. We were there several days, but it was only about 1500 feet operation. We were there several days, but there was a lot of work, house connections and cleaning up streets, and then we moved it back to Long Ridge and operated it there from June 30 to July 2nd. We did not operate it every day. We took it from the Long Ridge job to their warehouse, the Culjak and Zelko lot.

As to those cracks in these exhibits you call my attention to, and as to whether they are weather cracks or dry rot, it looks to me like it is squashed. This crack here at this end would be caused from a

(Testimony of Pat Devine.)

tight bolt or weather check. It is not more likely that this came out here from a tight bolt; it came from a rock that got jammed in here and busted that out. A rock got caught here and burned the whole thing up. All of those are rock bulges.

There was a bolt in there the same as that here. I say this is a rock bulge. The bolt isn't that tight. The cantilever comes over here and the whole weight of the machine is here. This track is 91½ pounds to the square inch when the whole track is on the ground. You have the 40 ton weight right on this point or on this point.

From about 1931 to 1938 this machine done one little job out in North Hollywood. I have forgotten the street. That job was about 15 days. I think it was about in 1935 or 1936. That was not the last job before it went to Fort Huachuca. In [61] 1938 we went to Tehachapi in Kern County. It was digging sewer trenches up there in the city. There was no rock there at all, just soft soil. That took about 21 days. That is about 125 miles from Los Angeles and was in 1938. That was the only job before it went to Fort Huachuca.

From the time the machine returned from Fort Huachuca until August 28, 1941, I made minor repairs. I repaired the conveyor chains. I took out twisted links and put in new ones. I replaced maybe 25 links. We had those links in the warehouse. I put them in at Long Ridge on the first trip there. They are different links. I did not put in any chain links such as you are referring to here.

(Testimony of Pat Devine.)

I put none of such links in at Magnolia or Long Ridge. The weight of the machine is 40 tons.

The man in Los Angeles who wanted to rent the machine is Mr. Nottingham. That was when we were putting in the new pads in September of 1941. He wanted to go to San Diego with it. He just casually inquired and I told him to call up Mr. Culjak. He did not say what he would do with it or how long he wanted it, just a casual conversation.

When we shipped this machine to Fort Huachuca, we took a pad out of each side. When they make them up new you can't tell whether they have too much slack, maybe sometimes there is an inch or so play and they may put in an extra pad, and in time you can take that out and take up the slack. That does not indicate considerable wear because there was a lot of slack to start with, but you can't connect it when they are new.

Redirect Examination

By Mr. Jones:

No part of that damaged condition to those pads or to the links was due to our work in California. Neither was the condition of the idler shaft. In my opinion, that condition was all [62] due to the work at Fort Huachuca.

TESTIMONY OF FRANK J. BARRY

Direct Examination

By Mr. Jones:

My name is Frank J. Barry. I am a practicing lawyer in Los Angeles and have been for 20 years. To the best of my recollection and from records which I hold in my hands, Mr. Culjak of the firm of Culjak and Zelko first consulted me with reference to this trenching machine and its rental to the defendants on July 8th, 1941. I wrote a letter on July 8, 1941 on their behalf to Del E. Webb Construction Company and White and Miller. I have a copy of that letter. (There being no objection, said copy of letter was marked in evidence as plaintiffs' Exhibit No. 3 and reads as follows:

July 8, '41

Del E. Webb Construction Co. and
White & Miller Contractors, Inc.
Fort Huachuca, Arizona

Gentlemen

Re: Culjak & Zelko v. Webb et al.

Mr. Martin Culjak of the firm of Culjak & Zelko has retained me to obtain an adjustment of their claim for damages to their trenching machine which they leased to you, said damages being the result of failure on your part to make necessary field repairs of damaged parts, which damaged parts resulted from unusual hard usage of the machine while operated by you.

Mr. Culjak has submitted to me the contract of lease and all correspondence with reference to same,

(Testimony of Frank J. Barry.)

and after a careful study of the entire situation I cannot see how the lessee can escape liability for making necessary field [63] repairs on the machine and returning the machine in as good condition as when received, ordinary wear and tear excepted. I am unable to convince myself that the damage to the machine is the result of ordinary wear and tear.

I feel certain when you have carefully analyzed and considered this matter you will recognize the reasonableness of the claim of Culjak and Zelko. I am sure also that you realize that it is no valid defense to their claim to say that the rental paid for the machine was high enough to cover the replacements which are now necessary.

I shall expect to have a reply within ten days so that I may determine what further action, if any, I should recommend to my clients.

Very truly yours,

FRANK J. BARRY)

fjb/jr

The Witness (Continuing): I did not receive any reply to that letter. I have a recollection independent of the record of what transpired at that time and thereafter, and the record assists me also in the matter. My recollection is that on the occasion of the conference of July 8th, it was concluded that it would be best to give the defendants an opportunity to repair this machine themselves rather than to have the plaintiffs repair the machine, and

(Testimony of Frank J. Barry.)

so, as shown in that letter of July 8th they were requested to let us know within 10 days whether they would repair the machine. That would bring the date up to the 18th of July.

I got no reply to that letter of July 8th. I received a letter of July 28th, 1941 from Mr. Collins, and that refreshes [64] my memory so that I can state that on July 26, 1941, which was Saturday, Mr. Culjak and Mr. Collins both called at my office and at that time, there was a discussion with reference to the repairs of the machine and, since more than 10 days had expired since the date of my letter of July 8th, I advised there was nothing else they could do but to make the repairs themselves, and on that date Mr. Culjak, on my advice, gave an order to Mr. Collins for 150 excavator chain links and 82 multiple slats with bolts and link pins, and then two days later on Monday, July 28th, Mr. Collins wrote me confirming the verbal order and enclosed a copy of the order for these materials.

This is the order that Mr. Collins put in on the 28th of July. (Thereupon, a letter with a copy of an order attached was marked in evidence as Plaintiff's Exhibit No. 4.) When later they had done this repair work, I referred the matter to Conner and Jones, in Tucson, who took the matter up after that and they brought in the Federal Court here.

(Testimony of Frank J. Barry.)

PLAINTIFF'S EXHIBIT No. 4

Los Angeles, Calif.

July 28, 1941

Mr. F. J. Barry
448 South Hill St.
Los Angeles, California

Dear Sir:

Enclosed please find a copy of the order which I have entered for Martin Culjak in accordance with his verbal instructions in your office Saturday.

If it is necessary for you to have an invoice to make your claim covering these items, I would be very glad to issue one to you.

I'm also enclosing the letters relating to the deal of Del E. Webb Construction Co. and White & Miller Contractors, Inc.

Very truly yours,

HARRY C COLLINS

Harry C. Collins

HCC/M
Encl.

Los Angeles, Calif.

July 28, 1941

Mr. Martin Culjak
1354 South Bonnie Beach Place
Los Angeles, California

Dear Sir:

In accordance with your verbal instructions, I have entered your order for the following parts for

(Testimony of Frank J. Barry.)

the Model 500 Austin Trench Machine, Serial #11304:

150 TE 261 Manganese Excavator
Chain Links assembled with
pins and bushing

Price\$4.90 ea. \$ 735.00

82 TK 271-1 Multipedal Slats with
bolts and link pins

Price\$14.20 ea. 1164.40

Total\$1899.40

Above price is plus sales tax.

Terms: 2% Cash—10 days

I can make immediate delivery on the 150 links of chain and it would take three weeks delivery on the multipedal slats.

Kindly sign one copy of this agreement which will constitute your order, and keep one for your own files.

Very truly yours,

HARRY C COLLINS

Harry C. Collins

Accepted July, 1941

.....

.....

[Endorsed]: Filed June 17, 1943.

Cross-Examination

By Mr. Dougherty:

July 26th is the day we had the conference and the verbal order was entered on that date.

(Testimony of Frank J. Barry.)

Mr. Jones: That is the plaintiff's case, if the Court please.

Mr. Dougherty: Your Honor, the evidence on the part of the defendants mostly consists of the deposition taken in Los Angeles, and I presume we can arrange to read that before the Court at this time.

Thereupon, the deposition of Harry C. Collins, taken on behalf of the defendants, on May 9, 1942, in Los Angeles, California, was read.

TESTIMONY OF HARRY C. COLLINS [65]

Direct Examination

By Mr. Jewell:

My home residence is 1516 Fourth Avenue, Los Angeles, California. My business address is 2421 East 57th Street, Los Angeles, California. I am an engineer, manufacturers' agent and dealer in heavy construction equipment, particularly, trenching machines, for digging trenches for sewer work and water lines, utilities; locomotives, either Diesel or gasoline, for road work, rock crushing and screening plants, designing of gravel and screening plants and general line of machinery for construction of dams, and so forth. I represent the Austin Machinery Corporation, Muskegon, Michigan, manufacturers of the Austin trench machine. I also represent Fate-Root Heath Company, of Plymouth, Ohio. The nature of my business is that

(Testimony of Harry C. Collins.)

of a manufacturers' representative for various machinery companies.

I sell the equipment manufactured by the various companies to the contractors direct from the manufacturer. They do the billing and they pay me a commission. I do no other work for these companies except selling repair parts and keeping the machine in order. I act as consultant with respect to repair work that is done on machines sold by these various manufacturing corporations. That consulting work is the type of work I referred to when I said I was an engineer and salesman for various machinery corporations.

I am acquainted with the plaintiffs in this action. I am familiar with the trenching machine owned by them and more particularly described as Model BE-Type C-Style 500 Machine No. 11346, being a ladder type machine manufactured by Austin Manufacturing Company, Muskegan, Michigan.

I originally sold that machine to the present owner. It is pretty hard to state definitely when the sale was made. [66] 1930 would be about right. From December, 1940 to April, 1941 that machine was at Fort Huachuca, Arizona, digging trenches for utilities for the Fort Huachuca camp under a contract held by Del E. Webb Construction Company and White & Miller, Contractors, Inc. To my knowledge, the machine was rented by the plaintiffs to the defendants.

I have seen this machine many times with the thought of renting it from Culjak & Zelko, but I

(Testimony of Harry C. Collins.)

can't say the exact date as to the time it was shipped over there. I would say that I had seen the machine 3 or 4 times during the year 1940, and that the last time I saw it was within 30 days prior to the time it went to Arizona.

I had occasion to inspect the machine after it was brought back from Arizona. I would have to refresh my memory a little bit as to when it was brought back from Arizona.

Mr. Jones: It is stipulated that it was the latter part of April.

(Testimony continued): I inspected the machine after it came back from Arizona between the 10th and 15th of May. It was returned from Arizona some time prior to the 10th or 15th of May. I do know the dates.

The machine was in Van Nuys when I inspected it. The exact street I do not know. It was on a job out there. The first time I saw the machine after it returned from Arizona was when I made the inspection at the request of Del Webb Construction Company. The request was made by telephone with the instruction to look the machine over and report to him the condition and necessary parts to put it in working condition, supposedly the same condition as when it left here.

I do not know the condition it was in at the exact time it left here, only that I had seen it previously and it was [67] in first class condition at that time. I knew that the parts were all in perfect condition because I had been selling those parts to keep it up

(Testimony of Harry C. Collins.)

in shape. I talked to Mr. E. G. Shaber regarding my instructions as to the inspection of the machine. He was the officer manager of Del Webb Construction Company, and White and Miller, Contractors, Inc. He told me that there was some question as to the operating condition of the machine after it was returned here to Los Angeles, and as the representative of the Austin Trencher, if I would go and make an inspection and report to him what parts were necessary to put the machine in first-class operating condition.

I made such inspection out at Van Nuys. It was not working at the time; it was on a Sunday. The work was only 50 feet; just had got the machine set to work. Just probably a couple of hours work. I did not see the machine operate at Van Nuys. I did not see the machine again after that Sunday at Van Nuys. I have not to this date seen the machine again.

I do not know whether or not the construction job that was being worked on at Van Nuys was completed by this machine. This inspection took me about one hour. I found the track pads which carry the machine and guide it along the ground badly bent, the wood parts were broken down and the steel casing over it had heavy indentures, putting them out of shape, and in my opinion, pads in that condition would not run true because they are made for that purpose of running this trencher in a direct line. Then I inspected each and every

(Testimony of Harry C. Collins.)

link, what we call the excavating chain links, and found them bent in places and stretched out of pitch. By the word "pitch", I mean there is a certain center between where the links connect that go over a sprocket and unless they are perfect, they ride on top of the sprocket teeth and the chain will jump off and break them. The [68] machine is propelled by means of 2 approximately 10 foot Caterpillar treads made up of approximately 82 pads, each pad being linked with the others by means of coupling links, with which the sprocket meshes and each of these ads is made up of wood covered by steel and each pad is approximately 5 inches by 6 inches by 24.

My examination found that the surface of these pads which is exposed to the road or earth, was indented at irregular points on each tread. The excavator chain links were bent and pulled out of pitch.

The excavator chain is made up of heavy manganese steel links with 10 inch centers, overall links about 14 inches, and each link held together with a manganese pin $1\frac{1}{4}$ inch in diameter. This link is a web construction link with a center open so that it will go over the top of the chain. This excavator chain was pulled out of pitch.

The pitch represents the distance between the point on the chain where the pin connects with each member of the chain, which enables this chain to engage sprockets that are made with a pitched center or identical distances.

(Testimony of Harry C. Collins.)

What I mean by pitch with respect to this excavator chain is that each link of the chain is the same length so each of the other links of the chain will mesh properly with each tooth on the sprocket.

When I say "it", meaning the excavator chain, was out of pitch, I mean that some of the links of the chain have been elongated so that they do not mesh with the teeth on the sprocket. This elongation of the links manifests itself in two forms, namely, where the manganese body of the link itself has been stretched, and where the holes of the couplings have been worn so that there is an elongation. Manganese steel will stretch [69] under great stress.

In addition to the difficulty with the tractor tread pads and with the pitch of the excavator chain, there were other minor parts that I considered had usual wear and tear and I did not make any report on them. For example, the idler rolls that the chain rolls on while it is in operation, were badly worn. The idler rolls are rolls that guide the chain and support it through the length of the boom. There are 6 top idlers and 4 lower idlers on the boom.

My inspection did not result in the discovery of anything else wrong besides the pads of the treads, the excavator chain links, and the idler shafts, nothing that I can say that would be considered more than usual wear and tear.

(Testimony of Harry C. Collins.)

We know about what usual wear and tear is when it gets on a job, and when it is beyond that point, or when it has weakened it or broken it, then it comes under what we call a major repair or major replacement.

I made a report to Del Webb Construction Company under date of May 12th, which is as follows:

“May 12, 1941.

Del E. Webb Construction Co. and
White & Miller Contractors, Inc.,
Fort Huachuca, Arizona.

Attention: Dale E. Griffith
Purchasing Agent

Gentlemen:

At your request I made an inspection of the Model 500 Culjak trencher. There were 102 excavating chain links that were bent, drawn out of shape, or worn down to a point where they were dangerous to operate. I believe that they should be recompensed for this amount.

[70] There were 150 links in the line originally which leaves 48 good ones. Mr. Culjak conferred with me on this and he thinks all of the links should be replaced as it would be very expensive to take the chain apart, sort out the bad links and put in the new ones. Naturally, it is up to you to make the final decision on this.

I have found that the 82 tractor pads are all in very poor condition. The ground is so rocky that the covering of wood slats are bent to such

(Testimony of Harry C. Collins.)

a point that rocks and other material get between the slats and do considerable damage to his machine. There is no way to repair these, as to remove, straighten and replace the pads would be more expensive than to give them a new set complete. The costs of these are \$14.10 each, f. o. b. our Los Angeles warehouse. It is very evident that the hard, rocky ground over which the machine has run is responsible for the condition it is in. In my judgment this could not be considered as normal wear and tear as these pads usually last for years. When they left here they were in first-class condition.

Trusting that this information will be of service to you in making your settlement, I am,

Very truly yours,

HARRY C. COLLINS"

When Mr. Shaber, representing the defendants, called me on the telephone, he asked me if I would go and make an inspection of the Culjak Model 500 Trencher which they had used at Fort Huachuca and make a report to him within the next two or three days. Sunday, which was the first day I had available, I went out and made that inspection. Mr. Shaber asked that I send them a letter reporting my findings. The letter has previously [71] been incorporated into the record as my report. I knew Mr. Shaber previously through conversations for

(Testimony of Harry C. Collins.)

about 7 months on this particular job, because when the job was first started that is when I commenced to send parts over to them, I knew that he was then representing the Del Webb Construction Company.

I can not give the exact dates when it was prior to December 1940 when this machine went over to the project in Arizona that I sold any parts or equipment for use for its repair or replacement. I would say about once every month they would buy something like a clutch would go out, but none of these parts that I have later sold to them, none of these major parts. It has been a long time, it has been practically a year. It is pretty hard for me to give the date that they purchased any of these chain links for the excavator chain because it is hard to separate just the chain links because they would buy just the parts like a shaft or a clutch, but it would be some time, probably 7 or 8 months or a year before they had previously bought any chain links.

I do not recollect of *every* selling them any pads for the caterpillar tread. It is hard to give any date when I sold them any idler rolls, but it is within the period of a year that they would take an idler roll because they wear, you know, about once a year.

The parts used to repair this machine while it was on the job over in Arizona and also immediately after it was taken off the job and before it was returned here were purchased from me.

(Testimony of Harry C. Collins.)

All those parts, it is a cost-plus part, were bought by Del Webb Construction Company. They bought and paid for the parts that were used in making repairs while the machine was on the operation.

[72]

The plaintiffs didn't buy any parts from me to repair this machine from December, 1940 until they made this purchase on July 8, 1941, but the user, the contractors, the defendants did.

On July 8, 1941, the plaintiffs ordered, through me, 82 multi-pedal slats and bolts, 2 idler shafts, 150 excavator chain steel links. The price paid by plaintiffs for the 82 multi-pedal slats and bolts was \$14.20, \$1164.40 for the slats, plus sales tax. The total is \$1199.33.

I haven't the prices here for the 2 idler shafts because that was on a separate order. The price paid for the 150 excavator chain links was \$4.90 each or a total of \$735.00, plus the sales tax, which would be \$757.05. After a link is spent or stretched to a point where it should be taken off, it is absolutely a complete loss, and has no salvage value except for scrap, about two cents a pound or about \$10.00 a ton.

Mr. Dougherty: That figure ten should be changed to forty. It should read forty dollars a ton.

Witness (Continuing): When I made my inspection between May 10th and May 15th, at Mr. Shaber's request, I measured the links because that was the only way I could tell they were stretched. I would see a link that was bent and oblong in shape,

(Testimony of Harry C. Collins.)

and then I knew right away. A stretch as much as three-eighths of an inch makes it practically useless as a rule. The center of those links, or pitch as we call it, is 10 inches, and when it gets to 10 and three-eighths or 10 and a half, we know it is dangerous to operate.

We don't have to measure them to see that they are bent, but you have to measure them to see if they are stretched. The ones that are bent you know are stretched, or they would not [73] be that way, because if they weren't bent to a point where you didn't think they were useful, the only thing to do is to go and measure them. Sometimes, the ones that are stretched are bent and sometimes they are not. It is what we call—it isn't bent in this way, it is the edge of it that is bent down where it weakens it. In other words, where it has got pressure on the top of it, that gives it this bending which makes it just as dangerous as in elongation.

When I made my inspection, I found that 102 of them should be replaced. There were 150 all together—but 102 of them was what I figured would be dangerous. I didn't ever measure or inspect this machine prior to the time it went over to Arizona. They generally do that themselves.

I do not know whether any of those links or the pads were bad prior to the time it went over to Arizona. I do know this, that when the machine is sent out they generally have a surplus of links there, and when they find a bad one, especially on rental, they take and replace those links. They

(Testimony of Harry C. Collins.)

don't get any pay when it is not running and they take ordinary care to put it in shape. Whether they did that or not, I don't know, but that is ordinary custom. After they put on the 82 new tractor pads and the 102 new links, that portion of the machine would be nearly new, but that doesn't affect the shafts which are liable to be crystalized, when you can't tell, or it might be the gears or pinions that might be worn. All those parts—but the biggest cost of the repairing is what we call a major repair, and this is a major repair.

I kept those links here in Los Angeles. I generally carry a complete set, sometimes more than that. And the same is true with respect to my supply of tractor pads.

Cross Examination [74]

By Mr. Barry:

Q. You stated that this was a major repair, the installation of these multi-pedal slats with bolts and link pins and 150 manganese excavator chain links, they were constituted a major repair, is that right?

A. Well, taking the word "major" what I mean is that it is the most costly part of the machine. There are two ways of making a major repair. I would say about 30 days prior to the month of December, 1940, when this machine was rented to Del Webb Construction Company, I had been over to see it. I had a prospect of renting it. That would be about the month of November, 1940. I have been trying for many months to dispose of it

(Testimony of Harry C. Collins.)

because there is no work for it for a good many years here, and I had inspected it during that period for the prospective buyers.

When I inspected it on or about November, 1940, I found the machine in what I would call first-class condition throughout. I would say that on or about November 1940, the tractor pads were in first-class condition. They showed no appreciable wear. I stated on direct examination, however, that I did not make an inspection of this machine prior to its leaving for Arizona on this Fort Huachuca job. I did not make any inspection for that particular job, but I made an inspection about 30 days previously upon a prospective lease to other parties, and for purchase, and at that time, I found it in first-class condition, and that was true as to the track pads and also as to the excavator chain links, and so forth, the buckets and gears and the engine had been just overhauled. I verified that. The engine had been, I believe, rebored by a local concern here.

I am an engineer and most of my life has been devoted to dealing in machinery of this character. I have been engaged in that kind of work about 40 or 45 years. I am 71 and I have [75] been 46 years in the machinery business. I was 10 years as representative and engineer for the Allis Chalmers Company. We there had crushing and cement machinery, rock crushing machinery, screening equipment and mining equipment, and all their general lines in electrical and steam. We put in complete plants and I had to know it all. That is all heavy

(Testimony of Harry C. Collins.)

machinery. That was my first experience as an engineer of that character.

Then I worked for my self following the same lines as manufacturers' agent for heavy machinery, and as a dealer, and I have been continually for the past 46 years engaged in this heavy machinery business as a dealer and engineer.

In that connection, I have been selling machinery, designing plants of different kinds, looking after the construction in some instances, servicing them in the way of repairs, examining used equipment for sale for other people, and making estimates and appraisals of machinery.

I think I can name a good many firms for whom I have been consultant during that period in the engineering line. Most every rock company in the southern part and northern part of California. There is the Union Rock Company. It is out of business now; but I was with John Gregg Company; Fenton Material Company, San Diego; George Daly construction Company of San Diego; V. R. Dennis Construction, San Diego—there are so many. Those are the major ones. There are a lot of smaller ones. The Imperial Valley Highway, I put in plants for them.

I serviced the Metropolitan Water District, sold them machinery, and advised on a lot of equipment there for the life of the job, 5 years. That is the big construction of the aqueduct from the Colorado River into Los Angeles and most of the dams here, like the Pine Creek Dam, the Don Pedro Dam. I [76] installed most all of their ma-

(Testimony of Harry C. Collins.)

chinery up there. That is the repair material for the good of the dam. Then, Bent Brothers, of Los Angeles, Griffith & Company. Those are some of the leading people.

This machinery was sold by me to the plaintiffs in the neighborhood of 1930. It is pretty hard to say what is the life of a machine of that character. There are some that I sold 20 years ago that are still going, if they keep it up. Twenty years would be a reasonable life of a machine of that kind.

When I inspected this machine, I recommended to Del Webb Company, the defendant, that it should have 102 excavator chain links installed. I did not afterwards make a different recommendation to the plaintiffs in the case with reference to the number of links that ought to be installed, that is, changing it from 102 to 150.

The reason for installing more than I recommended as necessary was that I am always anxious to see a machine operating successfully, and I know that it would not give the best results where you get some poor links and a lot of new ones, and the labor of making that change very often will save the amount of links that you would put in. I would say that it would be very nearly as costly for the plaintiffs to have installed only 102 links as to install a complete chain of 150 links. There would be very little difference. The 48 links which I considered were good enough to remain on the machine and which were taken off and replaced by new links were of no value to anybody excepting the man who

(Testimony of Harry C. Collins.)

owned the machine for an emergency repair. They were not salable, except at scrap prices. I do not know what became of those 48 links that were more or less in fair condition. They were not taken back by me. I got none of the material that was taken off the excavator chain nor the multi-pedal slats. I do [77] not know what became of that material.

As to the reasonableness of installing the 150 excavator chain links instead of 102, as I first recommended, when I recommended 102 links with the machine working on the type of ground that we use here in California, I was of the conclusion that the others were strong enough, they did not show any defective pitch, but they did show wear. In other words, I could only find 102 that were out of line and also that were bent. The other 48 did not show that, but they showed some wear and would not last naturally as long as the new links.

If this machine had been repaired with 102 links as I recommended in my report to the defendants, the machine then would have been in as good condition, insofar as the excavator chain was concerned, as when I inspected it in November, 1940, ordinary wear and tear excepted.

It is pretty hard to say in dollars and cents what saving would there have been in the cost of the repair of the excavator chain if 102 links had been installed in lieu of 150, but in round figures, I would say that you would have a little more than half the cost of putting in new links. In other words, half the cost of the 48 links, costing \$4.90 each, that

(Testimony of Harry C. Collins.)

would be a saving of \$117.66, plus the sales tax on \$117.66.

As to whether it is a usual thing to find a machine of this character developing so much damage in such a period of time as between December and April, everything depends upon the ground in which it is working. Certain soils, even a sandy soil, will wear out the chain as quick as hard material, because the grit gets into your pins and wears them out. They use these machines in all classes of work. I never have seen them used in quite the character over in Arizona, because I have noticed quite a few times on this job—not when this Culjak machine was there, [78] but a previous machine—and we had the same thing in San Diego, which is a very similar ground to work down there, and as a rule the owners of these machines do not like to send them down to San Diego because they realize that there is a lot of damage done to the machine that isn't seen on the surface, such as crystallizing the shafts, which is a very expensive part of the trencher machine.

It is a pretty hard question for me to say whether the condition of this machine at the time I inspected it at the request of Mr. Shaber was a condition resulting from ordinary wear and tear. I would say that looking at the machine, when I looked at it in Van Nuys, outside of the tracks and the chain, it was in just as good a condition as it was when I made an inspection with the idea of selling or renting it 30 days previous.

(Testimony of Harry C. Collins.)

Confining ourselves to the tracks and the chain, I would say that the deterioration or damage was in excess of ordinary wear and tear, but the work that they did on it over there to put it in shape overcame the difference between ordinary wear and tear and excessive wear and tear. That is the part outside of the Cats and others. In other words, they *brought* enough parts to put that machine in as good a shape when it left over there as it was when it left here. It is my opinion, that it was in as good condition as it was when I inspected it about 30 days prior to leaving for Arizona with the exception of the cats and the chains, the cat being the pad and the chain.

Contrasting the condition in which I found the cats and the chain on the occasion of my inspection of them at the request of Mr. Shaber at Van Nuys, with the condition in which I found the cats and the chain when I made an inspection of the machine 30 days prior to its going to Arizona, I would say that the deterioration or usability of the cats and the chain was due to the [79] extraordinary conditions under which it was operated.

The failure on the part of the person operating one of those machines to replace reasonably as soon as the defect appears a defective link, say, in the excavator chain, has the effect that it would serve to break or elongate the other links. As a matter of fact, one defective link tends to put out of alignment and destroy the symmetry of the entire chain. You might have serious trouble for failing to do a

(Testimony of Harry C. Collins.)

very small thing in these machines. I will say this though, that those people over there have 30 or 40 new links always on hand, and if the operators when they found a weak link had put it in where it would belong, why a lot of trouble, unusual trouble, would have been eliminated. I couldn't say whether they failed or not to put in these links. I know they had them on hand. I wasn't there to see it. I know they ordered them. They had extra links ordered there all the time. I don't think they had sufficient on hand to supply four or five every day during the time the job was going. That would be a very much exaggerated condition. They had enough links to take care of, I believe, the wear and tear that they were subject to over there if the operators would install them when they found these links were getting weak and jumping the sprockets.

Q. Well, for your information, and in order that you may give your opinion accordingly, Mr. Brownfield testified that they installed as many as 6 in a day, and 4 or 5 frequently.

A. I don't think it could be possible for them to do that every day with the amount of links they had on hand. I don't think it would be possible under any condition for that to happen on a machine even in that hard country.

I inspected those track pads. In my opinion, the reason for the damage to those track pads was going over uneven [80] ground with parts projecting with the weight of the machine on top of it.

The machine could be operated without having

(Testimony of Harry C. Collins.)

made the repairs on the track pads that I recommended, but I would say that under a disadvantage on account of not running true. All indications in my experience would show that when track pads get out of line and get indentures in them to such a point that one side is high and the other low, in other words, flattened down on account of the wood breaking, you can't get a true carriage, and you have got a tilting which throws the machine one way or the other. I don't know whether that would affect any other part of the machine with the exception that it would mean that they would not be able to run a true line, and I believe that would cause the work accomplished by the machine to be more expensive than if it did run a true line. It would mean that they would have to either straighten up the ditch or back their machine up and get it in line with the line laid down by the engineer.

I think it was absolutely essential to have the repairs which I recommended done on that portion of the machine with respect to the excavator chain if they wanted to make footage and get away from jumping of the chain on the sprockets or breaking of links, which would shut down the work. I believe the machine could have been operated under disadvantage without having had the repairs that I recommended. The disadvantage would consist of loss of time, breakage of parts due to unusual strains and so on.

Here is what happens on a link of a chain on a bucket like that. If it goes over you get a jar like

(Testimony of Harry C. Collins.)

that and a jar comes on a heavy head shaft where these sprockets are placed on, and those continually being jarred crystallize that shaft and they break off right near the point where those sprockets are put [81] on. When that happens your machine is out of commission until you can either have one made or you can get a new one. We don't carry, as a rule, that particular shaft in stock.

I don't believe it takes more power to operate a defective machine because we have ample. You can only get so much power out of it anyhow. The only thing I would say that would happen is that it has a tendency to damage all the rest of the parts of the machine that are immediately affected by the excavator chain, and if a chain breaks sufficient to drop the bucket line down, it is liable to break a bucket, or it is liable to break an idler roll, or liable to break an idler shaft. The hardest part of the machine, working part, is the bucket line. The other parts we don't have very much trouble with excepting a few little—just the wearing parts which are very inexpensive, such as jaw clutches. I don't think the excavator chain would have anything to do with running a true line. It is the multipedal pads that do that.

Redirect Examination

By Mr. Jewell: When I made this inspection prior to December, 1940, for the purpose of selling or renting this machine, I did not measure these links. They didn't show any unusual wear that the purchaser would raise any objection to buying. I

(Testimony of Harry C. Collins.)

didn't notice any of the links bent at that time. The terrain down around San Diego that I have referred to, is the roughest in the State of California, outside of San Luis Obispo. That over there is called conglomerate, mixed in with cemented material, and in that is boulders ranging from 3 inches up to, I would say, 24 inches, and you never know where they come. In digging a ditch you come down and this boulder might be off on this side of the ditch 10 inches, and 10 inches in here, and there is no way of getting it [82] out unless you shoot it out because you can't dig it. And when you get down to the bottom of the ditch you will find several of those running the full width of the ditch. It is very hard cemented material. If it was just cemented material, it isn't so bad because you have always a little something to get a purchase on.

These trenching machines operate all over the world. I wouldn't say that it is an improper use to use this type of machine on terrain of the type located at Fort Huachuca, if the ground is properly prepared and shot. In other words, what we call shooting by dynamite, putting the holes down. And a great deal depends on how they put the holes down. It is just a question of a good powder man. If they put them 5 feet apart, it is no use. If they stagger them 3 feet here and 3 feet here, it breaks them up so that there is enough loose stuff for the buckets to get ahold of. The only damage it will do to the machine is by continuing vibration every time one of those rocks is hit. That shock goes all through

(Testimony of Harry C. Collins.)

the machine. The operator with his levers can tell whether his bucket is striking a loose rock or a hard rock, and he immediately lets up on that and simply siggles, which he can do, slowly to get the bucket going. I would say that the use of this machine on this type of terrain is not improper, but it isn't—I will qualify it again and say again that it is not improper if it is properly prepared. It is absolutely improper for any attempt to use it if they don't prepare the ground so that they can dig it. The use of this tye of machine with proper blasting is not unusual even on terrain like at Fort Huachuca. We do it.

The reasonable price for the renting of this equipment for a machine of this size and what it costs, the money invested, is about 10% per month of the cost of the machine, which would [83] make it \$1600.00 per month. That is how all this rental is based on. A machine that will dig 16 to 20 feet deep and 52 inches wide, which this machine will do, is always rented, to my knowledge, at \$1600.00 single shift, 8 hours, and \$800.00 for the second shift per month. That is supposed to represent, in the trade, 10% of the cost of the equipment new.

The cost of this machine new with the attachments taken on there is in the neighborhood of \$16,000.00 or \$17,000.00. Another thing enters into the rental and that is the length of time. If a man puts a machine out for a month he wouldn't even rent it at that price. The engine condition or the condition when it comes back might be such that you

(Testimony of Harry C. Collins.)

would spend all of your rental to put it in shape, so you can rent it to somebody else, so there isn't much profit to the renter.

The lessee pays the transportation from the day it leaves until the day it is returned to the point of its origin. That is the standard on all kinds of equipment, not only with trenching equipment but everything else.

A while ago, I stated that I considered 20 years a reasonable life of equipment such as this. I base that on this here: A trench machine isn't run every day of the year, and we figure a 20 year life. It is not 20 years of actual operation, but 20 years from the time it was bought until the termination of that particular time. The average machine runs about 10 years in 20, but we take it, if a man wants to buy a piece of equipment, the first thing he asks is, "When was that bought?" When I say that this was bought in 1920, that makes it 20 years old.

The life of a piece of equipment of this type, if it were in daily use, depends on the owner. If he takes care of it and doesn't let the piece of equipment when it gets weak wear out and break, that is one condition of life. If he keeps it greased [84] up, keeps his engine in good shape, and replaces a shaft when it shows a weakness, or puts a gear in when it is worn down to a point where it should be replaced, they will last, I will say, indefinitely, or they ill last for 20 years even in actual operation with proper care. But with the operation that they generally get on these machines, about 10 years

(Testimony of Harry C. Collins.)

would be the life of one, 10 years of actual operation.

I would say that the ordinary life expectancy of a piece of this type of equipment that was being rented out would be 10 years of actual operation. As to what I mean by proper care, here is what it starts from: First, a poor operator that doesn't know how to operate the machine. In other words, he speeds it up and doesn't take advantage of the condition of the ground which he is in. Another is that he will try to do more than the machine is built for. If it is built for 15 feet, he goes down to 20 or 25. I mean by proper care a replacement of parts as they wear out.

Referring specifically to these links of these chains, the links of the chains wouldn't have much bearing on the life of the machine. It is the life of the machine as I place it, the life of the shafts, the life of gears, the life of sprockets and the life of the engine. You understand, the chain on there they keep on wearing out and being replaced. That is anticipated in all machines of that kind. They all operate under the same conditions.

With respect to the links of these excavator chains, it is not anticipated that they wear out and are replaced many times during the life of the machine. I have had machines here that chains have been on there, on ordinary going, around 2 or 3 years. Some wear out more quickly according to the ground it is in. If it is a harder ground they wear out a good deal faster [85] because you have a

(Testimony of Harry C. Collins.)

strain on it, but if it is a soft ground they naturally last a good deal longer. There is another case of an operator. Get a poor operator in them and they can tear them to pieces very quickly, because if they get caught in a snag instead of levering they will put the power on there. They have got tremendous power on there and they can pull anything apart.

With respect to the pads of the treads, I don't think it is anticipated that they will wear out and be replaced before the life expectancy of the machine is completely utilized. I would say that the average machine of this type with average use that they would have, would wear out in 10 years about 2 sets of tractor pads.

I wouldn't say that the tractor pads coming as original equipment on the trenching machine with ordinary reasonable use should last as long as the life of the tractor. I would say it would be anyway 75% of the life of the tractor, that they would be good for.

I would say that the life of these excavator links, if it is subject to ordinary reasonable use would be about one-third of the life of the machine, with proper care and no unusual conditions being used. As a rule, these trenchers are made for a place like around Los Angeles, or ground where it isn't hard, and you don't find as a rule, only under the conditions as they exist today, where they attempt to put sewers in the hard ground, excepting in San Diego or some of these cantonments, or places where they have to have a good sewer system.

(Testimony of Harry C. Collins.)

Recross Examination

By Mr. Barry: The character of the ground upon which a machine is to be used under a rental contract does not to a very great extent have any affect upon the reasonable rental which is charged for [86] such machine. We base a rental on whether it is used on soft ground or hard ground. That is the way it generally goes. But here is another condition: If a machine goes far away, where the owner can't make a personal supervision on it, he asks a little more for it, and everybody figures he is entitled to more than if it was right close where he could see if they would abuse it. That is the way rentals are based.

All these parts which are recommended to be used upon the machine were not available in Los Angeles at the time. The track pads had to be made. They had to be made here in Los Angeles. I think it took nearly 30 days between the time they got the order and the time delivery was made. I had a certain portion of these in stock, but I didn't have sufficient to make the whole chain and you couldn't start doing anything unless you had everything on the ground. The same thing applies with chain. I happened at the time not to have a sufficient chain to make a complete set. The repairs could have been done in 40 days.

The prices charged by me for these materials that I sold for the repair of this machine are the standard price which we charge everybody. It is estab-

(Testimony of Harry C. Collins.)

lished by the factory. It is the reasonable price charged in this community for such a pad.

Redirect Examination

By Mr. Jewell: It wasn't until July 28, 1941 that an order for tractor pads or links was placed with me. On August 28th we billed it, and we bill as soon as the stuff is delivered. At any time subsequent to the middle of May 1941, and prior to July, it would have taken approximately 30 days to get the tractor pads and other links unless they caught me with a surplus of stock.

DEPOSITION OF WARD A. BROWNFIELD
a witness for defendants.

Direct Examination [87]

By Mr. Jewell: My address is 429 San Pascual, Alhambra. I am familiar with the trenching machine in this case. I was the operator of the machine at Fort Huachuca. It was on 2 shifts. I was on the day shift and they run a night shift too. I was the first operator to operate the machine after it was delivered at that project. I have been working on equipment of this type since 1925 as an operator. Since 1925, I have done work in repairing this type of equipment.

The machine was in very good shape at the time it was delivered to the project. Those pads on the Caterpillar treads were in pretty good shape. Of course, the ends of the wood was checked a little bit,

(Deposition of Ward A. Brownfield.)

but outside of that the track was in very good shape.

I think there were a few indentations on the pads of the Caterpillar treads, just a few small ones, but not anything to amount to that would interfere with the operation of the machine. The excavator chain seemed to me to be in very good shape.

An operator can't go back and look at that thing going over the sprockets while it is in motion, but as far as I know, from the position where I was operating it, it operated satisfactorily. It didn't jump off the sprockets which it does when there are bad links and the chain being out of pitch with the edge sprocket. There might be one bent link in there and it will throw your chain off, naturally.

While I operated it, it didn't jump the sprocket, unless we hit a rock down there and then it would jump off.

We made several repairs on the machine during the time it was on this project. We put on new links all the time. There were new links put in that chain, I imagine, at the rate of 4 or [88] 5 a day, because we would break them, this rock would. There were 180 links in the excavator chain, I think. There are two of these chains and about 90 links in each chain. The machine was used practically every day and it was there a month before they started to have 2 shifts on it, the night shift.

During the work, we broke a hoist nut that hoists the boom and we had to wait for that to come, and we put the hoist nut in and the hoist screw in, and when I think—that was around 3 days—and then

(Deposition of Ward A. Brownfield.)

we had another breakdown. We broke the head sprocket shaft. That is the shaft that the sprockets are connected to. And then the rainy days took up the other days that we didn't work. In other words, a 10-day period was made up of days of inactivity intermittently. We made other repairs on this machine during the period from December, 1940 to April, 1941 other than as I have heretofore described. We put in a transmission shaft, but that was put in during the night shift so I didn't lose any time on that.

I stated previously that maybe at times we might have put in 4 or 5 or 6 links in the excavator chain a day. Hitting a big rock and things like that, would cause us to replace particular links. You are to understand that it was only when a link broke that we replaced it. To my knowledge 4 or 5 or 6 a day would break, and it would be necessary for us to replace them before we could continue operation. In other words, the breakage of one link would stop the operation of the machine.

As to the other repairs made during the period the machine was operating on this project, there were times when we would tear off on idler on the bottom of the boom and the chain would come up. It might have hit a big rock and the chain comes up and before you can notice it, unless you have some good man back there, he just lets you tear everything up. Well, at times we [89] would have to stop to replace those. I wouldn't remember how

(Deposition of Ward A. Brownfield.)

many idler rolls we replaced. We had them welded and I think we put an—I don't know as we put on any new ones. I think we just welded what we had.

I do not think of any other repairs on this machine while it was operated on the project. I was there when the project was completed and when this particular trenching machine was taken off the job.

After this trenching machine was no longer on the project, it was repaired before it was returned to Los Angeles. The valves were ground, what you would call a tune up, and the pan of the motor was taken off and the sludge from the oil cleaned out, and we put in a new liner in the twin disks, a master clutch, and we put in new bevel gears in the conveyor drive, we put new sprockets on the idlers for the conveyor chain and shafts, and we rebabbitted all the chains on the boom. Those are idler roller chains, and they welded flanges on the tail wheels. They are welded all the way around. And there was a new conveyor belt for it.

That is the conveyor that takes the dirt out. And we replaced a number of the chain links, around 20, I think it was, and we welded all the buckets. The lips on the bucket were broken out, some of them, where the teeth had been pulled off, and we had those all welded and put back on. This repair work took 2 weeks, and was done out right where we loaded the machine. We loaded the machine on a railroad car at the siding of Fort Huachuca.

I next saw it out at the Los Angeles freight depot

(Deposition of Ward A. Brownfield.)

where I helped to unload it. I took it over to the yard of Culjak and Zelko, the plaintiff's yard. We took it over by truck and trailer upon which we loaded it from the railroad car. [90]

When we returned the machine to the yard of the plaintiffs, Mr. Devine over there helped me unload it. As to whether the machine was in substantially as good a condition when it was placed by me in the plaintiff's yard as it was when I first saw the machine at the project at Fort Huachuca, well, the pads on the tracks were in terrible shape. When we took them off—I helped take them off—and when we got them off and when we took the hinges off of the pads, the wood just all fell apart; and the chain to my knowledge was approximately 75% good, but I didn't measure any links to come to that conclusion. The links may have been off pitch quite a bit, but seemingly, to look at it, I would say that 75% of the chain was in fair shape.

I did not notice anything wrong with the operation of the excavator chains on the day we finished the job at Fort Huachuca, because we had rock and it was pulling the machine down anyway so you couldn't tell exactly whether the pitch of the chains was pulling the motor down or whether it was a rock.

Mr. Cavanaugh told me to do the repair work on this machine before it was loaded on the railroad car and taken from Arizona to Los Angeles. My instructions in connection with this work were to put it in as just good repair at it was when it came

(Deposition of Ward A. Brownfield.)

down here. I followed out those instructions as near as I could. Those were precisely the instructions Mr. Cavanaugh gave me. At the conclusion of this repair work, I had a conversation with Mr. Cavanaugh. I asked him what he was going to do with the treads on the track, that they were pretty badly mashed up, but I don't remember his reply to that question.

At the time I was operating this machine, I was employed by Del E. Webb and White & Miller Construction Company. After I left the employ of the defendant, and about 2 weeks after I returned the trenching machine to the plaintiffs, I went to [91] work for the plaintiffs. I worked for them about 4 months, I think, all that summer; from about May until along in August, I believe, or September, off and on. When I first started to work for them, the job I was working on was the Van Nuys job, a sewer job. I don't remember how long that job lasted. It must have been a month or 6 weeks anyway. I worked on that job until its completion.

From the time that I commenced to work on the Van Nuys job, until the time that job was completed, this trenching machine to which we have referred, was used by the plaintiffs on this job; not every day, because it was a wet job. They might dig 50 feet and lay that. It might take them 3 or 4 days to lay that. But it was there at all times. I wasn't the operator at that time; but I saw it every day.

(Deposition of Ward A. Brownfield.)

Along in the latter part of August I saw those pads I referred to. I saw the wood fall to pieces. I was helping to take them off the machine. That was the first time that I had ever seen the inside of any of those pads. You can't see them because they are enclosed. The ends are open so you can see the ends of the wood.

I was never called upon on this Van Nuys job to do any repair work on this machine, and I couldn't say whether any repair work was done on it on this Van Nuys job.

After leaving the Van Nuys job, this machine went to Inglewood, I think in June or July. I also went to work down there, but did not operate the machine. I think it worked down there 3 or 4 days, maybe a week, but it was down there a little longer than that, I think, because they didn't take it right into the yard when they got through. From there it went into the yard where it stayed until it was repaired in August. From the time that I came back from the Inglewood job until this repair work on [92] the machine was done in August, I did other work for the plaintiffs. At the time I did this repair job over in Arizona at the conclusion of that job, the tractor pads were in much worse shape than when the machine was delivered. They were in much worse shape than ordinary wear and tear for that period of time would make them. There was one good reason why they were in the shape that they were in. It was rock. They were running over rock. I mean they were

(Deposition of Ward A. Brownfield.)

digging through rock. And another thing, they had to run this machine on its own power from points to where they were supposed to dig, and that was all open field and some of the time that was run at night time to these different locations. I did not run it at night time, but I know it was shifted around to different positions, digging points, and some of that was done at night.

When I finished this repair work at Fort Huachuca, except for the pads on the Caterpillar treads and except for the fact that the buckets were welded buckets instead of new buckets the machine was in as good a condition as when it had been delivered.

Cross Examination

By Mr. Barry:

I worked on this machine in the employ of plaintiffs about 3 days in November, 1940, before it went to Fort Huachuca for this work. At that time, it was in very good condition. When I worked on the machine those 3 days in November of 1940, the wood ends of those track pads were checked a little bit, and also there were a few depressions in the casing metal. When I say the wood was checked, I mean the wood was checked just like an ordinary board would be checked on the ends, little checks, little checks in them, small slits, as it were. As to these depressions or indentations on the surface of the [93] steel covering of these wooden portions of the tread pads, there were a

(Deposition of Ward A. Brownfield.)

few, but they weren't very deep. They were noticeable.

As an experienced operator of a machine of this kind, and being familiar with such machines, I don't think the checks in the wood or the indentations on the metal which I noticed in the machine in November 1940, or thereabouts, would have an effect on the working part of the pad at all, nor would they have any effect upon the machine if it were to cross a street.

I testified that before this machine went to Arizona the pads were in very good shape, because of my familiarity with machines of this character and because of having operated them for long periods of time, for 17 years. As to whether there was anything in the nature of the work that was done in Arizona by this machine while in operation by the defendants that affected the track pads of the machine, there was the formation of the ground. You couldn't use these trenching machines on solid rock. They are used on solid rock when the rock is blown out or blown up by dynamite.

However, every place that this sewer was put in down there the roadway for the machine was bladed. They run a road grader over it to level it down. And of course there were rocks that were sticking up that they couldn't get out, but they tried to put dirt on that so that we wouldn't run the tracks on it because if you deliberately run over rocks of course you are going to break something, but the road was made, it wasn't just a raw concrete, it

(Deposition of Ward A. Brownfield.)

was level to a certain degree, and to a certain extent, we succeeded in covering over those rocks that were sticking up, but to a certain extent, they were still there. The effect which these rocks that remained had upon the tractor pads was that the weight of the machine on these pads would bend these casings on these wood pads and break the wood inside the pads. [94]

The passing over of these track pads over these rocks, over such rocks as I have described, would cause indentations in the steel covering of those wooden portions, and such indentations would be different from the kind of indentations that were in the machine when I saw indentations in November of 1940, in that there would be more of them and deeper. The effect of them would be that it would throw the pitch of the links on the pads off from the sprockets that drives it, and that would break and bend shafts, and it would tend to put a strain on all of the working parts of the trenching machine. It would affect the machine in maintaining a straight or direct line and would cause it to run from one side to the other. It wouldn't run true. I testified that in going from one part of the works to another in Fort Huachuca, it was necessary to cross over fields or certain ground to get the machine from one location to the other. The open fields there were most all rock, and I believe the machine was run over such rocks as were on such fields. They couldn't help it once in a while,

(Deposition of Ward A. Brownfield.)

especially when they were moving at night. I didn't work at night at all.

In my opinion, the pads at the time the machine was repaired at the siding at Fort Huachuca prior to being loaded on the railroad flatcar, were in very bad shape. That opinion is based upon an examination which I made of the machine at that time.

To my knowledge, before we made the repairs, while the work was still uncompleted, the machine was all right. There are times when a bent link will throw the chain off the sprocket. After it comes off we have to put one on to replace the bent one that throws the chain off.

Ordinarily, we could tell why a link would jump the sprocket. It would be either a bent link or a rock in the top of [95] the head sprocket that drives the bucket line. If a link is stretched, its length is longer than the pulling space on the head sprocket. The head sprocket is a 6 point stationary casting with teeth on it, and if the links stretch out, they won't go over the head sprocket, they won't mesh with the teeth on the head sprocket. The 2 chains have to go over this sprocket at the same time at one point, and if one side of this chain is pulled, one link is stretched, that throws the pitch off the other side too. In other words, if there is one defective link, it has a tendency to interfere with the effectiveness of the other links also, and if you neglect to repair a link promptly when the repair is needed, the result might be that the entire chain of links would be detrimentally affected.

(Deposition of Ward A. Brownfield.)

After the digging was completed on April 3rd, we spent a period of around, I think, 2 weeks making repairs there. Those damages requiring those repairs did not occur during the last few minutes of operation.

We put in a number of links after that. Those links were in good working condition. The links we replaced were not, to a certain extent, in good working condition, and that is the reason why we changed them, but we didn't change them while the work was being done; we waited until it was finished. The last day we could have bent a lot of links, because there was a lot of rock out there, a lot of rock all through the job, as a matter of fact. Some of it was conglomerate all through the job. There was solid rock and we had to raise the boom and blast it out so we could go on. The ditch had been dynamited before ahead of us all the time. And then we used this machine to excavate that dynamited rock. As to whether trenching machines of this character are used for that purpose, this one was down at Fort Huachuca. [96]

Trenching machines are not used for excavating solid rock that has been blasted out. It is not practical. Using a machine of this kind upon rock such as I described would have a straining effect on all the links of the chains, the head sprocket and head sprocket shaft. It would have an effect on the pitch of these links.

Pretty nearly all the difficulties that we had over there with these chain links were due to rocks.

(Deposition of Ward A. Brownfield.)

It is my opinion that, outside of the pads on the track and the buckets being welded, instead of being as they were before, the machine was in about the same condition when returned to plaintiffs as when it arrived at Fort Huachuca. When the machine arrived, the buckets had teeth along the lips. These teeth were broken off and sometimes a part of the lip would be pulled off and that is where the buckets were welded. As far as working, I think they will dig just as well.

In my opinion, 25 per cent of the links in the excavator chain were in bad shape. When 75 per cent of the links in an excavator chain are in good shape and 25 per cent in bad shape, the pitch of the links is off and the 25 per cent had links have a tendency to put the other 75 per cent in bad shape. When I assisted in making the repairs on the machine the last of August or first of September, we put new treads on the track, those are called multi-pedal slats and bolts. I don't remember how many we put in. We replaced all the links in the excavator chain.

Redirect Examination

By Mr. Jewell:

I have stated that a roadway was built on which to operate this tractor on the Arizona project and an effort was made to avoid rock. That is customary. This roadway was built as free from rocks as they could do it. They had one man out [97] leveling up in front of the machine. All he did

(Deposition of Ward A. Brownfield.)

was to level the ground and take as many of the rocks off the roadway as he could. I never saw the machine moved at night and wouldn't know whether it was moved without a man moving rocks in front of it or not and wouldn't know whether, when moved at night, it went over any rocks or not.

While I was operating the machine I had no trouble with it going straight. At times it would get off, but usually it stayed pretty well on the center. As long as they can get the pipe in they don't kick about being off center a little bit, three or four inches doesn't make any difference.

It is customary to keep an eye on your excavator chains. The chain does not rotate by you. The operator does not get out to watch the excavator chains and see what condition they are in. He will not get off the machine or let anybody else on it. It is customary to know at all times what condition your machine is in. You go around it several times a day and it is not merely inspection, but your eyes are trained to look at all the things that can get out of order on the machine. I might say I watched the machine constantly. I can tell by the feel of the operation of the machine if something is wrong. However, you can tell a bent link only if it comes off the sprocket. It is not customary to measure those links to ascertain if they are stretched.

I said 25 per cent of the links were bad after we placed 20 new links on the chain at the conclusion of the operation. Some of those links were just

(Deposition of Ward A. Brownfield.)

bowed, just bent a little bit on one side, that is the 25 per cent.

As far as I know 100 per cent of the links were perfectly straight when the machine was delivered to the project. The 25 per cent of links that were bowed or bent would put undue strain and wear on the head sprocket teeth and also the [98] sprocket shaft and would cause the remaining 75 per cent to become damaged, because if there is one link that wasn't stretched on one side and the opposite link, on the side directly opposite this link, would be stretched, it would pull the whole chain and, of course, when it comes over, there is only one sprocket on the top and at the bottom and the stress would be on the head sprocket.

A trained operator couldn't detect with the naked eye particular links which were bent to some degree unless he watched them go over the sprocket, or put a square on the link, or a rule or calipers. But at times you can see if a link is stretched enough and you can see them if they are bent.

The 25 per cent which I testified were bad were either bent or stretched and those in that condition would be readily noticeable to a trained operator.

I told Mr. Cavanaugh that the plaintiffs would probably not accept the buckets.

Q. Would you say, in view of your experience as an operator of this type of equipment, that with respect to all the type of terrain where you operated this machine, or where you knew this machine was operated in Fort Huachuca, that its operation on

(Deposition of Ward A. Brownfield.)

such a type of terrain was customary and usual for a trenching machine of this type?

A. No it is not usual.

It is not practical for the reason that it costs too much money to do it that way. The dynamiting and repairs cost too much.

Recross Examination

By Mr. Barry:

The reason there was so much repairs while this machine was on the job was because of the character of the terrain. First the solid rock which was encountered was blasted and then the [99] machine was used to excavate it. Sometimes boulders, about 3 by 5 feet and equally thick, would be encountered in conglomerate formation and these had to be dynamited. They were imbedded so solid we couldn't get them out. I don't think they were quite 3 cubic feet in dimension, but they were about 2 cubic feet. These we could take out and carry on the conveyor. This job was an unusual job for a trenching machine. In all my experience of 17 years in operating these machines, I had never seen a machine of this character before operated on such ground.

When I stated on direct examination about the taking out of those rocks after they had graded the road in front of the machine and I stated they took out as many of the rocks as they could, that indicates that there were some they couldn't take out, but this man we had in front would cover those up, so that

(Deposition of Ward A. Brownfield.)

we wouldn't ruin the machine by going over those rocks; but, nevertheless, there were some of those rocks that remained after that kind of operation and to a certain extent they were injurious to the machine.

Redirect Examination

By Mr. Jewell:

It is not customary to use a machine of this type in cases where it is necessary to blast conglomerate rock.

TESTIMONY OF LESLIE H. SNELLING

a witness for defendants.

Direct Examination

By Mr. Jewell:

My name is L. H. Snelling. I reside at 919½ Eighth Street, San Fernando, California.

I am acquainted with the contracting firm of Culjak and Zelko and have inspected a number of jobs they have had for the City of Los Angeles.

On April 28, 1941, I was inspecting for the City of [100] Los Angeles the job known at the Longridge Sewer Job which was being constructed from Riverside Drive to Moorpark Street in the North Hollywood district of Los Angeles. That job was being built under contract with Culjak and Zelko and the city of Los Angeles. Culjak and Zelko were digging the sewer trench; the job had started prior to the 28th of April and they had been using a

(Testimony of Leslie H. Snelling.)

small trenching machine to dig the trench. The ground was wet and it was necessary to pull a shield behind the trenching machine. The small machine they were using was not capable of doing the work very well. Mr. Culjak told me a few days prior to the 28th of April that he had a bigger machine which had been rented out on a government job in Arizona and which would be returned to him in a few days, and said that as soon as he got it back he would put it on this job. A few days after he told me this, and on the 28th day of April, 1941, he did put the big machine on the job. He told me he had just gotten it back from Arizona. The big machine was a chain-bucket type Austin trenching machine. On April 28, 1941, the big machine was placed on the Longridge Sewer Job and worked continuously on that job until the 7th of May, 1941. It was then pulled out of the trench and moved over to the job on Magnolia Boulevard.

On May 13th the machine was put to work on the Magnolia Boulevard job, doing the same kind of trenching work that was done on the other job, but without the shield attached for a few days and then the shield was again attached. The Magnolia Boulevard job was completed on June 11, 1941. The machine was then moved back to the Longridge Avenue job on June 30, 1941, and again put to work on that job and kept there until it was finished on July 22, 1941. Part of the time, on both of these jobs, a shield was carried by the machine, due to the wet condition of the dirt. [101]

(Testimony of Leslie H. Snelling.)

I was the inspector on both jobs and saw the machine in operation every day while it was being used. There was an interval from the 11th of June to the 30th of June during which the machine was not being used on the jobs I was inspecting. I do not know what happened to it in that period of time, but so far as I could see and observe no major repair had been made on it.

Insofar as I could tell from watching the machine operate, it seemed to be in reasonably good condition from the time it was brought back from Arizona and put on the job, until it was taken off. I did not hear Mr. Culjak or Mr. Pat Devine, who worked for him, make any complaint about the work the machine was doing, or say or indicate in any way that the machine was not capable of doing the job.

So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over here, without any major difficulty and no breakdowns of any consequence.

During the time that Culjak and Zelko were doing the work above mentioned they had in their employ, at least for part of the time, a man named Brownfield. I am not sure that he operated the machine, but I know that he was around the machine and

(Testimony of Leslie H. Snelling.)

working on the job during most of the time that the contract was being fulfilled.

Cross-Examination

By Mr. Barry:

When making inspections, as a city inspection, I am interested not only in the finished work but in the work as it progresses, such as the width of the trench, and the backfilling. [102] I mean I am interested in the character of the work done and not the machine that does it. I am only interested in the finished product, and it make no difference to me whether they dig it with a pick and shovel or a trenching machine if the work is done according to city specifications. We are not interested in whether a machine works efficiently or not so long as the trench is on a true line.

I cannot make the statement as an actual fact that I was able to tell whether the machine was efficiently operating or not. I could only tell from sound and from watching. It did not make any grinding noise that I know of. I was right behind it. The most noise is by the motor.

I am not a mechanical engineer. All I know about these machines is to see them working. I couldn't tell its parts nor distinguished whether this was one machine or another machine. I know the different types, such as Barber-Greens and Austins and Pearsons. I would know this machine was an Austin because of the make.

The reason I stated in my direct statement that

(Testimony of Leslie H. Snelling.)

the machine seemed to be in reasonably good condition when brought back from Arizona is because there were no breakdowns.

That was soft ground,—no rocks or hard substances to excavate, yet there are breakdowns in that type of ground, not only on Austins, but all types of trenching machines; just like a man with a pick, if he don't have it sharpened once in a while, he is slowed down.

They put a shield on the back of the machine to keep the mud from filling in the trench.

I called their attention during the work several times to the fact that they were deviating from the line of the sewer and we had to get back on the line. [103]

It was not customary for Mr. Culjak or Pat Devine to complain to me when their machine was out of order. I never heard them at any time make a complaint about a machine not working properly. When the inspection department such as I represent has to talk to a contractor about faulty work, he lays it on to the machine, but if Pat Devine and Culjak had any complaint about the machine they kept it to themselves.

As far as my statement on direct examination that "so far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona," I didn't inspect it. I made

(Testimony of Leslie H. Snelling.)

that statement as they asked me. As a matter of fact, there could be a lot wrong with that machine and I would never know about it, even if I inspected it.

Redirect Examination

By Mr. Jewell:

I never looked at the track pads on the machine. I didn't look at them close enough to notice any indentations or anything like that.

As to the deviation that occurred in digging this ditch, the reason for such deviation in my mind was that the pressure of the wet dirt—almost quicksand—and the weight from one side might, before they could get it tight again, push it over and this whole shield and all might be moved over one way or the other, or it might be a case where the tracks on the digger was not even, but so far as I know the deviation in the trench wasn't any greater than some other trenches that are made.

TESTIMONY OF DAN CAVANAUGH

a witness for defendants.

Direct Examination [104]

By Mr. Dougherty:

I am general manager of L. N. White Contracting Company. Between the first of December, 1940, and the latter part of August, 1941, I was superintendent of Del E. Webb and White and Miller, at

(Testimony of Dan Cavanaugh.)

Fort Huachuca. I know that trenching machine that was used on the job building the cantonment there. I saw it when it first came on the job. It was in very good condition. It was on the job from the middle of December to about the middle of April. It was used digging trenches for the sewer and water lines. The land there is composed of real fine silt, clay that is embedded by boulders—the boulders are embedded in this fine dirt.

They always run the blade along the ditch line that was staked out by the engineers. One man worked in front of the machine, clearing out where the tracks run. There were rocks embedded and some projected through the surface. When there were large rocks showing above the surface this man was supposed to throw dirt over them, so the machine could pass over them.

Prior to digging this ditch, it was all shot along the line of the ditch. When they would strike a big boulder down in the ditch line they would shoot it again down below the surface.

There were many repairs on the machine while it was there.

Mr. Dougherty: This list here, your Honor, is in evidence by stipulation.

The Court: Repair list.

Mr. Dougherty: A prepared list submitted. It is conceded it is part of [105] the evidence in this case.

The Witness (Continuing): I could not tell the exact number of those chain links furnished without

(Testimony of Dan Cavanaugh.)

seeing the list. I know we were buying parts all the time and tried to keep a supply on hand. The machine was kept operating all the time it was there, and there were some repairs made almost daily. The pads looked good when they came, except they showed they were weather-worn.

I have been twenty years in the contracting business. I have had experience with trenching machines, including the Austin trenching machine. This pad you call my attention to is a multipedal pad. This condition here shows that it is deteriorated wood. It is not just wet cracked. That is from age. Those cracks indicate dryness.

I am familiar with these chain links. It was the practice to change the links whenever they got cracked or bent. I would call that a necessary field repair. I would also call it a necessary minor repair.

We did not replace or repair any of the multiple pads on the machine because the machine did the work satisfactorily while it was there. We considered the replacing of those pads on a machine a major repair.

Q. And what is meant by the phrase "necessary minor or field repair"?

(Objection by Mr. Jones as calling for a conclusion. Discussion and argument by counsel.)

The Court: Go ahead with the examination, with the understanding that the Court reserves the right to eliminate all this testimony if counsel can show it is immaterial.

(Testimony of Dan Cavanaugh.)

Mr. Dougherty: [106] Read the question again please.

The Reporter (Reading): "Q. And what is meant in the trade by the phrase 'necessary minor or field repair?'"

A. Minor repairs, as I understand it, are repairs to keep the machine running.

Mr. Jones: If the Court please, the phrase "minor repairs, as I understand"—That does not mean that the expression has a meaning in the trade, and I move to strike that answer.

The Court: It may go out. The motion is granted.

Mr. Dougherty: As generally used in the trade, what does that expression mean?

A. It means to keep the machinery, the equipment running; the repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or someplace outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running.

It was not necessary to put on new pads, repair the pads, to keep the machine running on our job. I regard the making of repairs on the chain links as necessary minor repairs or field repairs.

When the job was finished, I told Brownfield, the man who was running the machine, that we wanted the machine put back in the same condition

(Testimony of Dan Cavanaugh.)

it was when it came, ordinary wear and tear excepted. He worked on the machine. He had helpers, I don't know [107] how many. He worked on the repair job about two weeks. The machine was not used again by us after the repairs.

We blasted all the trenches and then if we came to boulders we blasted again. This is spoken of as rock. It is not rock. It is boulders embedded in this fine, silty ground that becomes very hard and tight, but when broken up is a very fine dirt. These big boulders are only occasional. Most of the boulders or rocks are small, up to about six or eight inches in diameter. Occasionally, they run into a reef of big boulders and that is where this testimony has come out on these big boulders, but in the majority of cases after the ground was shot, the dirt dug very well. That is the common use of those machines there.

The machine was never moved very far from one line to another. Only on two occasions was it moved more than a few hundred feet. One time the machine was walked perhaps a mile, not at night. And then, when the job was finished on the west-end, the machine was walked back again. Those were the two long walks. Like any other utility-ditch, the ditches are close together; especially they were on that camp job.

Cross Examination

By Mr. Jones:

Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as

(Testimony of Dan Cavanaugh.)

requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into the condition it was when you got it, ordinary wear and tear excepted?

A. Yes, sir. That is what I considered those terms to mean in effect. I thought we had the obligation so far as the chain links were concerned. I remember they were spoken of by Mr. Brownfield who told he they were in bad shape. I knew they were in bad shape, [108] much worse than when we got them; but I am sure if those wooden pads would have been good, solid wood, we would not have the condition we have now.

I don't know who had Mr. Collins look at the machine for us, but he was authorized. Collins was a well known man in the trade to pass on things of that sort. Mr. Morrison was a White and Miller representative.

I have never operated or repaired a trenching machine.

I said the machine had two long walks from the two ends of the ditch. From the sewage disposal ground was about a mile and from the old fort about two miles. It made those trips overland. I have never used board under trenching machines unless to level it. You have to throw plenty of dirt to protect the machine against projecting pointed rocks. Whether they did that or not I don't know.

(Testimony of Dan Cavanaugh.)

Redirect Examination

By Mr. Dougherty:

I would not say, due to the terrain, that the damage done to those pads could be considered ordinary wear and tear.

Q. Would it be ordinary wear and tear for that terrain?

A. Yes, sir, it would be for that terrain.

Mr. Dougherty: That is all.

Mr. Jones: Q. It would not ordinarily be considered ordinary wear and tear?

A. I say due to the terrain. That was more than ordinary wear and tear.

Mr. Dougherty: Defendants rest.

Rebuttal

TESTIMONY OF MARTIN CULJAK

(a witness for plaintiffs) [109]

Direct Examination

By Mr. Jones:

As to the meaning of the words "necessary minor repairs," we consider in the contracting business that anything that is damaged on a construction work should be replaced at the time it is damaged, and not wait until everything is gone; and as to "field" repair that anything damaged in the field should be repaired right there and not wait until everything is gone. If a pad is damaged and bent

(Testimony of Martin Culjak.)

and indented and spread out, the operator should stop right then and put in a new slat right there and not wait until all of them are damaged. Anything beyond actual wear and tear that is damaged is not ordinary.

The machine was actually operated about eighty hours altogether after we got it back from Arizona and before it was repaired. It ran at different times a few hours a day, but altogether it was about eighty hours.

When Mr. Collins inspected that machine at the request of the defendants, it had been operated about six hours. That was on the North Hollywood job. He could not see all the links of the chain because the boom was in the ditch and the lower part of the links was covered in the dirt. It was not in operation when he saw it, the day being Sunday. Forty-five of the links he could not see. He was not right when he said there were one hundred and fifty links in the chain, because we put in one hundred and eighty.

By putting all the weight of the machine on one place on that traction pad, it crushes the wood entirely, regardless of the kind of wood, even if brand new. It would crush even a steel block if you put all the weight on one point, forty tons. You are bound to bust something.

Cross Examination [110]

By Mr. Dougherty:

When you put a forty-ton weight on top of a small projection, most naturally something would

(Testimony of Martin Culjak.)

have to crush or bend or something would have to give. It is not built to travel over such terrain as that.

The two jobs upon which this machine was used about eighty hours were about three miles apart. Our warehouse is approximately sixteen to nineteen miles from the jobs.

I knew when I rented the machine that it was going to be used at Fort Huachuca. We do not say in the contract the kind of ground our equipment is to be used on, but we say our equipment is to come back just as it went. The contract says that the lessees should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project.

Redirect Examination

By Mr. Jones:

I asked Mr. Morrison what kind of ground it was and he said it was some hard clay but no rock in it. I said, "Mr. Morrison, if you have any rock in the ground, I am not interested in renting the machine, because I need the machine in my business and cannot afford to wreck my machine," and he said there was no rock in the ground. I took his word for it. I never was in Fort Huachuca and did not know the condition of it.

The machine was moved to those jobs at Van Nuys and other places and from job to job, after it came back from Fort Huachuca, with a truck and

(Testimony of Martin Culjak.)

trailer. We are not allowed to run it from job to job on the streets. It is a misdemeanor to run it on the streets except with truck and trailer. The work done by the machine at Inglewood was done after it was repaired by us.

TESTIMONY OF PAT DEVINE

(a witness for plaintiffs) [111]

Direct Examination

By Mr. Jones:

The wood in those pads is oak or hickory. This wood is first kiln-dried to take the shrinkage out of it. They then put it in a press and drive it through a frame press, small at one end and bigger at one end, and they press it through that. That's to take up any slack in it. The undertake to thoroughly dry the wood. They next put it in a big vat of linseed oil, to save it from expansion, contraction or rot and also to waterproof it. This is done to protect it from rotting or expansion. If it is waterproofed, it will not take up water and will not expand.

That wood is thoroughly dried before it is put in the pad. It will last for years. You could bury it in the ground and it would last for years,—fifty years—because it cannot take up any moisture.

(Witness examines pads Mr. Cavanaugh was looking at.)

(Testimony of Pat Devine.)

This pad is crushed. Its deterioration is not due to dryness because it is out of shape. It is apparent on its face that it is crushed. When that pad received blows sufficient to make those heavy dents or indentations in the steel, it crushes the wood. I cannot see any dry rot in the wood. You see the oil is right through that (Takes small piece from the wood and exhibits it. Witness demonstrates difficulty in breaking wood).

Q. Take the other end there and let the judge see you get a piece off of there.

A. I can't hardly cut it. It is solid. If there was dry rot, you could not see the grain of the wood.

If there was a newly bought pad, with brand new wood in it and had received the same treatment this particular pad did, the same thing would happen. It would squash a new plug the same [112] as that. The track is nine and one-half pounds to the square inch, and if you don't distribute the weight—you can multiply that a thousand times, and put all that weight on the surface, and something is bound to squash. A small surface cannot bear the weight or forty tons.

One of the methods of protecting the pads in operating over rocky ground is to plank it, and the other is to drag off the rocks or take them out or cover them over. The pads cannot be protected by shoveling just a little dirt over the rocks. It requires not less than six inches of dirt over the rock, and then you have to give it a gradual pull when you are going over a rock. When we are

(Testimony of Pat Devine.)

moving the machine and we come to a rock likely to cause damage to the pads, if it is too big to take out, we cover over with either plank or dirt, and in some cases we break the rocks up in pieces and throw them out. As to the amount of dirt used to cover them over, it depends upon the size of the rock. Some would take a wheel barrow and another a yard of dirt. We would put the dirt at least six inches above the top of the rock. That is the common practice because if there is not enough on there the weight will squash the dirt.

If that had been done, I don't think these pads would be in this condition.

A blade would remove all the loose rocks, but would ride over those embedded in the soil. You would have to cover those with dirt or break them up with a sledge or put boards over them.

When we got the machine back to California, the tracks were warped out of shape and spread, and had lost their pitch. They would buckle up into a V-shape, and then with the carrier roller coming along, it would have to go over this and that would throw all the weight on one side and drag you off the line. [113]

There was no purpose in making complaint about the machine to Mr. Snelling. He is only an inspector.

Minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop

(Testimony of Pat Devine.)

fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation.

I Would say those injured or damaged pads were field repairs.

This machine was moved from job to job in California by truck and trailer.

The practise in operating these machines in ground where there are rocks is to always have a man on each side of the trench. They watch for rocks and when they come up they ring the bell and the operator shuts the machine down. Two men are necessary because one cannot see both sides of the trench.

When Mr. Collins inspected this machine it was on Magnolia Street. The boom was down in a nine foot trench. The buckets and chain were full of and buried in dirt. He could not see the entire chain. You can't crawl down there. There is no room for you.

There were one hundred and eighty links in the chain. The maximum depth the boom will operate is twenty-five feet. The machine was set for fifteen feet for Fort Huachuca. When you want to excavate twenty-five feet you have to have more chain than you have to have for a fifteen foot boom.

(Testimony of Pat Devine.)

Cross Examination

By Mr. Dougherty: [114]

I have never been over the ground at Fort Huachuca. Brownfield told me they had two men to keep the rocks off, one on each side.

Q. Look at this. Is that wood crushed?

A. That is where the rock was caught in between the two.

Q. There is no crushing there, is there? It is wood here.

A. It is wider in here and wider in here.

Q. There is no crushing here, where you see these indentations?

A. The whole block is crushed. It was squashed out in here. This should be tight in here, but it would squash it in here, and squash it out at both ends.

Q. By putting that bolt in is when they crushed that, wasn't it?

A. No, that could not happen. It is the same as putting something in a vise. It is solid here and here (indicating). It is more crushed where the bolt goes through because a rock came here and a rock in here.

The changing of links is a minor repair. It takes about twenty minutes to change a link when you break one. A minor repair would cause a field repair if neglected. A minor repair and a field repair could be the same. They both cover the same thing exactly. The breaking of a differential answers the same question. The only thing is that

(Testimony of Pat Devine.)

you are laid up longer. You have to go to a machine shop and get it repaired or get a new one. It could be a field repair.

A general overhaul would not be a field repair, babbit up all the bearings, scraping, painting, cleaning.

When you break a pad, you take it out and put in a new one, because that one defective pad will break up a series of pads, because it does not function properly.

Lots of things you can get by with. You can get by without a tire in your automobile. You can run without it, and if [115] you have to, you will do it.

Redirect Examination

By Mr. Jones:

A minor repair is a minor repair, just what it says. A field repair is any repair made in the field. It might be big or it might be small. Sometimes you have to take the whole machine apart. If it were a shaft that was broken, it would take several days to take the shaft out and put it back in. There are some repairs that are field repairs which are not minor repairs.

Q. What you really mean by minor repairs are field repairs, but there are some repairs that are field repairs that are not minor repairs. Is that what you mean? A. Yes.

Mr. Jones: That is all we have, if the Court please.

Mr. Dougherty: That is all, your Honor.

Respectfully submitted,

FRANK J. BARRY

CONNER & JONES

Attys. for Appellants. [116]

[Title of District Court and Cause.]

ORDER TO SEND UP ORIGINAL PAPER

It appearing that Exhibit 1 should be inspected by the appellate court and that a correct copy thereof is infeasible, it is

Ordered, that the Clerk send up said original Exhibit 1 and that it be retained by the Clerk of the United States Court of Appeals for the Ninth Circuit until the appeal be determined, and that it then be returned to the Clerk of this Court.

Done in open Court this 26th day of February, 1944.

ALBERT M. SAMES,

Judge.

[Endorsed]: Filed February 26, 1944. [121]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of Monday, August 30, 1943 (Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

Civ-99

It Is Ordered that judgment for the defendant be entered herein. [122]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action came on for trial before this Court, jury having been waived, on the 17th, 18th and 19th days of June, 1943, Frank J. Barry, Esq. and Gerald Jones, Esq. appearing for plaintiffs, and John P. Dougherty, Esq. for the defendants; and after hearing the evidence, the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law, constituting my decision in said action:

FINDINGS OF FACT

1. That the plaintiffs and defendants are residents and citizens of the States of California and Arizona, respectively, and that the amount involved in this action exceeds the sum of \$3,000.00.

2. That the plaintiffs and defendants on or about the 1st day of December, 1940 entered into a contract in writing, as set forth in the Complaint, whereby plaintiffs rented to the defendants a certain Austin trenching machine for the use by the defendants at Fort Huachuca, Arizona. [123]

3. That said machine was purchased by said plaintiffs and Pat Devine in 1930, and was operated about 10 or 11 months between 1930 and 1940, and for the last seven years of that time had stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years. That when said machine was delivered to defendants it was in condition to render efficient, economic and continuous service.

4. That under the terms of said contract it was provided, among other things, that "All necessary minor or field repairs to equipment shall be made by the Lessee without cost to the Lessor. Other than minor or field repairs shall be made by the Lessors without cost to the Lessee".

5. That the said machine was, during December, 1940, transported by the defendants at their expense from Los Angeles, California to Fort Huachuca, Arizona.

6. That said machine was operated at Fort Huachuca by defendants from its arrival there until on or about the 7th day of April, 1941.

7. That during the time of said machine was at Fort Huachuca the defendants furnished and paid the operators thereof and in addition expended the sum of \$4,211.13 for parts and labor in making all

the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of \$8,250.00 in rentals.

8. That at the termination of said operations the necessary minor or field repairs were made on the machine and it was then returned to the plaintiffs at Los Angeles at defendants expense, and shortly thereafter, on April 28, 1941, it was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was [124] operated until May 7, 1941, when it was moved over to the Magnolia Blvd. job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941 when it was returned to plaintiffs' yards in Los Angeles.

9. That the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts the Court hereby decides:

1. That the defendants, in accordance with the terms of the contract, made all the necessary minor or field repairs before delivering said machine to plaintiffs.

2. That the plaintiffs are not entitled to the damages prayed for in their complaint or at all.

3. That the defendants are entitled to a judg-

ment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly.

Dated: October 7th, 1943.

ALBERT M. SAMES,

Judge. [125]

(Second Draft) Proposed Findings of Fact & Conclusions of Law filed October 6, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Findings & Conclusions filed October 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Copy received this 6th day of October, 1943.

CONNER & JONES,

By GERALD JONES,

Attorneys for Plaintiffs. [126]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of
Saturday, October 7, 1943
(Tucson Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

Civ.-99

John P. Dougherty, Esquire, Assistant United States Attorney is present on behalf of the defendant. No other appearance.

The defendants' proposed findings of fact and conclusions of law and plaintiffs' objections and proposed amendments and additions thereto having been submitted to the Court,

It Is Ordered that the plaintiffs' objections to proposed findings be denied, except that there be added to paragraph three of defendants' proposed findings the following: "That when said machine was delivered to defendant it was in condition to render efficient, economic, and continuous service"; and that the word "continuous" be stricken from the last line of paragraph 8 on page 2 of defendants' proposed findings.

It Is Further Ordered that the plaintiffs' proposed amendment and additions to defendants' proposed findings of fact and conclusions of law be denied.

Said counsel for the defendant now presents re-engrossed form of findings, and

It Is Ordered that same be approved and filed.

Said counsel for the defendant now presents form of judgment and represents that the same has been approved as to form by counsel for the plaintiffs.

It Is Ordered that the same be approved, entered and spread on the minutes as Judgment herein, as follows: [127]

In the District Court of the United States
For the District of Arizona

No. Civil-99-Tucson

MARTIN CULJAK and JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO,

Plaintiffs,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 17th, 18th and 19th days of June, 1943, Frank J. Barry, Esq. and Gerald Jones, Esq. appearing as counsel for the plaintiffs, and John P. Dougherty,

Esq., for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the Court sitting without a jury, whereupon witnesses were examined on the part of plaintiffs and defendants, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is Ordered and Adjudged that the plaintiffs take nothing by their said action and that the defendants recover the sum of Thirteen and no/100 Dollars as defendants costs and disbursements incurred in this action.

Judgment rendered day of, 1943.
[128]

Proposed form of judgment filed October 6, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Judgment entered and filed October 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Approved as to form: Attorneys for Plaintiffs.
10-6-43, Rec'd Copy.

CONNER & JONES,
By GERALD JONES. [129]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, TO STRIKE AND
AMEND FINDINGS OF FACT, CONCLU-
SIONS OF LAW, AND FOR JUDGMENT
FOR PLAINTIFFS

Come now the plaintiffs pursuant to Rule 59 of the Rules of Civil Procedure, and move the court to grant a new trial of this action, to strike and amend findings of fact of the court, conclusions of law, and for a judgment for the plaintiffs on the following grounds:

1. The undisputed evidence in this case is that the trenching machine when returned by the defendants to the plaintiffs was not in a condition to render efficient, economic, or continuous service because of the failure on the part of the defendants to make the minor and field repairs, set up in the pleadings and shown by the pleadings, thereto becoming necessary during the operation and possession of said machine by the defendants, and that the amount of damages and value of loss are in the sum of \$4166.80. These plaintiffs therefore move the court to set aside the judgment heretofore entered herein and rendered judgment for these plaintiffs and against the defendants in the said sum.

2. Finding No. 7 is immaterial to the issues in this cause. The amounts expended by the defendants for parts, labor, and/or [130] rent, have no bearing on the case, and plaintiffs move the court to strike said finding.

3. Finding No. 8 should be amended to conform to the undisputed evidence in the case as follows:

(a) So that it will state the extent of the operation of said machine; and

(b) So that it will state that when the said machine was returned to the plaintiffs it was not in a condition to render efficient, economic, or continuous service because of necessary minor and field repairs then needed.

4. Finding No. 9 should be amended to conform to the undisputed evidence in the case so that it will state that adjustments were made by the plaintiffs in parts of the machine to secure limited operation thereof by the plaintiffs upon its return to them.

5. The court erred in overruling plaintiffs' objections to defendants' proposed findings and in denying plaintiffs' proposed amendments to defendants' proposed findings.

6. Conclusions of law are erroneous in that they are unsupported by the findings of the court and evidence in this case.

Points and Authorities

The judgment of this court appears to be based on the view that if the machine, when returned by the defendants to the plaintiffs in California, was in a condition to be operated at all, the plaintiffs are without remedy. It is submitted that this is a mistaken view of the law. The plain intent of the contract was that the defendants should make all minor or field repairs required while the machine was in their possession and which were necessary

to put the machine in a condition [131] where, to quote the contract, it would render efficient, economic, and continuous service upon its return to the plaintiffs. This is equivalent to the common law rule that one who rents a machine of this type must return it in as good condition as it was when received, ordinary wear and tear excepted. While it is true that plaintiffs were able to operate the machine to some extent after it was returned to them, that operation was, nevertheless, neither efficient, economic nor continuous. The court will recall that adjustments had to be made at once in order to operate the machine; that the pads were in such battered condition that the machine could not be moved on paved streets without serious damage thereto; that in digging a trench, even in very soft ground, the machine would not run a true line and had to be constantly shifted, etc. 8 C.J.S. Sec. 27 p. 228—25 C.J.S. 600, 601, 631.

Since the amount of the damages was not in any serious dispute, it is respectfully submitted on the undisputed evidence in this case, plaintiffs are entitled to judgment in a sum not less than \$4166.80. True, the plaintiffs did not ask for that much, but that is a defect in the prayer only, and one which the courts these days ignore as inconsequential (Rule 54 C). The pleadings are amendable to conform to the proof (Rule 15 B). In truth, however, it will be remembered that the plaintiffs requested this amendment in the course of the trial, and it is not doubted that the court intended to grant it if it

had deemed the plaintiffs entitled to any recovery at all.

Respectfully submitted,
FRANK J. BARRY,
448 S. Hill Street,
Los Angeles, California.
CONNER & JONES,
By GERALD JONES,
303-6 Valley Bank Building,
Tucson, Arizona.
Attorneys for Plaintiffs.

Copy rec'd this 18th day of October, 1943.

F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Oct. 18, 1943. [132]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of
Monday, November 29, 1943
(Tucson Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

Civ.-99

Plaintiffs' motion for new trial, to strike and amend findings of fact, conclusions of law, and for

judgment for plaintiffs comes on for hearing this day.

John P. Dougherty, Esquire, Assistant United States Attorney, is present for the defendant. Gerald Jones, Esquire, and Frank J. Barry, Esquire, are present for the plaintiffs.

Said motion is now duly argued by the respective counsel, and

It Is Ordered that said motion for a new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs be and the same is denied. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Martin Culjak and Joseph Zelko, co-partners in business under the firm name and style of Culjak & Zelko, plaintiffs in the above entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered in the above entitled court and cause on the 6th day of October, 1943, which said judgment became final and appealable on November 29, 1943 by the order of the above entitled court denying the said plaintiffs' motion for new trial, to strike and amend

findings of fact and conclusions of law, and for judgment for plaintiffs.

FRANK J. BARRY,
448 S. Hill Street,
Los Angeles, California.

CONNER & JONES,

By GERALD JONES,
303-6 Valley National Build-
ing, Tucson, Arizona.
Attorneys for Plaintiffs.

Copy Received 2-25-44.

JOHN P. DOUGHERTY,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 25, 1944. [134]

[Title of District Court and Cause.]

DOCKET ENTRIES

Date	Plaintiff's Account	Received	Disbursed
8/22/41	Conner & Jones	15 00	
9/30/41	Treas. US Tr-1-Tuc		10 00
12/31/43	Treas. US Tr-2-Tuc		5 00
		15 00	15 00

Abstract of Costs

To Whom Due	Amount
Marshal's fees	50
Deposition	2 50
Attorney's docket fee	10 00

[135]

1941

Aug. 22—File complaint.

Aug. 22—File praecipe for summons.

Aug. 22—Issue summons.

Aug. 26—File Summons with return on service of Writ executed thereon.

Sep. 9—File defts' mo for more definite statement and for Bill of Particulars, and memo in support thereof.

Sep. 15—File pltf's response to mo for more definite statement and bill of Particulars.

Oct. 3—File stipulation of counsel for defts that the United States Attorney be substituted as counsel for the defts herein.

Oct. 6—On mo Dougherty, order enter U.S. Attorney as Attorney for defts herein in place of Bilby & Shoenhair, & Strouss & Strouss, pursuant to consent filed by said attorneys for defendants. Mo. Dougherty, Order grant motion for Bill of Particulars filed herein & direct U.S. Attorney prepare order therefor specifying matter to be covered by said bill of particulars.

Nov. 3—Enter & file Order for plaintiffs to furnish defts. attorney with Bill of Particulars.

Nov. 5—Issue copy of Order to furnish Bill of Particulars to John P. Dougherty, Asst. U.S. Attorney for service on counsel for plaintiff.

1941

- Nov. 5—File copy of order to furnish bill of particulars with plaintiff's acknowledgment of service thereon.
- Nov. 13—File pltfs. Bill of Particulars.
- Nov. 21—File stipulation extending time of defendants to answer to December 8, 1941.
- Dec. 8—File stip that defts have to 12/18/41 to plea.
- Dec. 16—File stip that defts have to 1/10/42 to plea or answer.

1942

- Jan. 10—File defendants' answer.
- Jan. 17—File pltfs' motion that cause be set down for trial before jury.
- Jan. 26—Dougherty for Govt; no other appearance, Order pass pltfs motion for trial setting to Feb. 2, 1942 at 10 a.m.
- Feb. 2—On for trial setting; Dougherty pres; Jones pres; Order pass for setting until parties are ready. [136]
- Mar. 24—File stipulation to take depositions of Harry C. Collins, W. A. Brownfield and L. H. Snelling, witnesses on behalf of the defendants.
- Apr. 17—File supplementary stipulation to take depositions as to manner of questioning witnesses Harry C. Collins, W. A. Brownfield and L. H. Snelling.
- Apr. 29—File stipulation to take deposition of C. P. Wherren.

1942

- May 6—File assignment of claim and/or judgment; from Culjak and Selko to Ward Thomas, etc.
- Oct. 17—File depositions of Harry C. Collins, W. A. Brownfield and L. H. Snelling.
- Nov. 5—File stipulation relative to deposition of Ward A. Brownfield.

1943

- Jan. 20—File assignment of claim and judgment from Great Indemnity Company to Meriwether Investment Company.
- Apr. 23—File stipulation re cost of labor and material employed in repairing trenching machine.
- May 15—Order set this case for trial Monday, June 14, 1943 at ten a. m. (Issue notice to counsel)
- June 2—File subpoena with Marshal's return showing service upon Don Cavagaugh.
- June 14—On for trial; Dougherty pres; no other appearance; Mo Dougherty, Order pass for trial to follow C-9580-Tue.
- June 17—On for trial; Jones pres for pltfs; Dougherty pres for defts; Burgess sworn as reporter; Both sides announce ready; Mo Jones, Dougherty consenting, Order complaint amended by interlineation, Page One, Line 6, 1st paragraph to insert words "Citizen and" after words "plaintiff is a" and in last line on Page One words "Citizen and" following words "struction Co.

1943

is a''; Jones moves to amend prayer to recite that plaintiffs seek to recover sum of \$5100.38, Dougherty resists; Order motion submitted. Counsel now stipulate that a jury is waived herein. On stipulation of counsel, Order amend complaint by striking word "hour" in line 24, words "per week" and "per month" in line 25 of last page of complaint being marked Exhibit A, page 7; On stipulation counsel, Order amend complaint Page 2, paragraph IV second line by interlineation of word "or" following words "Necessary [137] minor"; Enter proceedings of trial; at 5:15 p.m. recess to 6/18/43.

June 18—All present; Enter further proceedings of trial; at 5:08 p.m. recess to 6/19/43, at 10 a.m.

June 19—All present; Enter further proceedings of trial; Case argued to court; Counsel stipulate that the labor costs were divided 85% for installing tractor pads and 15% for installing chain links. Order allow pltf 10 days to file memo on rental value & allow def't 10 days to ans.

June 25—File memorandum of plaintiffs.

July 6—File memorandum of defendants.

July 10—On stip counsel, Order allow pltf 10 days to file answering brief. (Issue notice to counsel)

July 17—File reply memorandum of plaintiffs.

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- July 28—File assignment from Meriwether Investment Company, Ltd. to Martin Culjak and Joseph Zelko.
- Aug. 31—Docket Order judgment for defendant entered 8/30/43 (Issue notice to counsel).
- Sep. 21—File defendants proposed findings of fact and conclusions of law.
- Sep. 28—File plaintiff's objections and proposed amendments and additions to proposed findings.
- Oct. 6—File defendant's (second draft) proposed findings of fact and conclusions of law.
- Oct. 6—File defendant's proposed form of judgment.
- Oct. 7—Dougherty pres; no other appearance; Order pltf's objection to proposed findings denied except there be added to #3 of proposed findings "That when said machine was delivered to defts it was in condition to render efficient, economic and continuous service" and that word "continuous" be stricken from #8 last line page 2 of proposed findings. Order reengrossed form of findings presented by Dougherty approved and filed; Order form of judgment presented by Dougherty entered, filed and spread on minutes as judgment.
- Oct. 7—File Findings of fact & conclusions of law (see paper #30).
- Oct. 7—Enter & file judgment for defendants (see paper #31).

1943

- Oct. 11—Docket Govts. memo of costs, etc., with notice to be [138] taxed October 13, 1943.
- Oct. 13—Tax costs as claimed by defendants in sum of \$13.00 and enter in J.D. and form of judgment.
- Oct. 18—File pltf's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs.
- Oct. 22—File pltf's notice of hearing of pltf's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for pltf's—for Monday, November 8, 1943, at ten a.m.
- Nov. 8—Order continue Pltf's motion for new trial etc., to November 29, 1943.
- Nov. 8—File receipt of Court reporter for Plaintiff's exhibits 1, 2, 3, and 4.
- Nov. 29—Plaintiff's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs on for hearing; Dougherty pres; Jones pres; Barry pres; Motion argued by respective counsel and ordered denied.

1944

- Feb. 25—File plaintiffs' notice of appeal.
- Feb. 25—File plaintiffs' bond on appeal in sum of \$250.00 with General Casualty Company of America as surety thereon.
- Feb. 25—Deliver copy of notice of appeal to office of United States Attorney, Tucson, Arizona, counsel for defendants.

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Feb. 26—File stipulation as to record on appeal.

Feb. 26—Enter & file order to send up original paper to CCA, to wit: Ex. 1.

Mar. 29—Docket condensed narrative of testimony filed March 24, 1944.

Mar. 29—Docket reporter's transcript of testimony in three parts filed March 24, 1944.

Mar. 30—Enter & file order extending time for filing record on appeal to 4/24/44.

Mar. 30—Issue notice to counsel.

Apr. 19—Enter & file order directing Clerk to forward reporter's transcript with record on appeal.

Apr. 19—Prepare record on appeal—429 folios @ 5c. [139]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated that the record, proceedings, and evidence to be included in the record on appeal in this matter are as follows:

- (1) Complaint; and Stipulation filed April 23, 1943.
- (2) Order to Furnish Bill of Particulars
- (3) Fill of Particulars
- (4) Answer
- (5) Findings of Fact and Conclusions of Law
- (6) Direction for Entry of Judgment

- (7) Judgment
- (8) Motion for New Trial, to Strike and Amend Findings of Fact, Conclusions of Law, and for Judgment for Plaintiffs
- (9) Minute Entry denying Motion mentioned in number (8) above
- (10) Notice of Appeal and proof of Notification [140]
- (11) Transcript of the Evidence
- (12) Condensed Statement in Narrative Form of all Testimony
- (13) Exhibits, as follows: 1, 2, 3, and 4
- (14) All Docket Entries
- (15) This Stipulation

It Is Further Stipulated that the appellants shall not be required to file any statement of the points on which they intend to rely on the appeal as the record is deemed by the parties to be complete.

The parties hereto join in requesting that the Condensed Statement of the Testimony mentioned in item (12) above, rather than the Transcript of the Evidence mentioned in item (11) above, be printed as a part of the Transcript of Record.

Dated February 26, 1944.

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Build-
ing, Tucson, Arizona.

Attorneys for Plaintiffs

FRANK E. FLYNN

United States Attorney

JOHN P. DOUGHERTY

Assistant U. S. Attorney

Tucson, Arizona

Attorneys for Defendants.

[Endorsed]: Filed Feb. 26, 1944 [141]

In the United States District Court
For the District of Arizona

November 1943 Term

At Tucson

Minute Entry of

Thursday, March 30, 1944

Honorable Albert M. Sames, United States District
Judge, Presiding

Civ-99

[Title of Cause.]

ORDER EXTENDING TIME

On the motion of John P. Dougherty of counsel
for the defendants in the above-entitled case, it is

hereby ordered that the time for filing the record on appeal and docketing the action be, and the same is, hereby extended to and including the 24th day of April, 1944.

Dated: March 30, 1944.

ALBERT M. SAMES

United States District Judge

[142]

[Title of District Court and Cause.]

ORDER TO FORWARD DUPLICATE ORIGINAL OF REPORTER'S TRANSCRIPT

On motion of Gerald Jones, Esquire, counsel for the Plaintiff,

It Is Ordered that the Clerk forward with the record on appeal herein a duplicate original of the reporter's transcript of testimony certified by the reporter as being correct and filed by the reporter in these proceedings.

Dated at Tucson, Arizona, this 19th day of April, 1944.

ALBERT M. SAMES

Judge

[Endorsed]: Filed April 19, 1944. [143]

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE
TO TRANSCRIPT OR RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court including the records, papers and files in the case of Martin Culjak, et al, Plaintiff, versus Del E. Webb, et al, Defendant, Case No. Civil-99-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 143, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid, together with a duplicate original of the reporter's transcript certified by the reporter in three volumes and original Exhibit 1 introduced at the trial of said cause which are transmitted herewith as called for and designated in the Stipulation as to Record filed in said cause and made a part of the transcript attached hereto.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$21.95 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the Seal of said Court
this 19th day of April, 1944.

[Seal] EDWARD W. SCRUGGS,
Clerk. [144]

[Endorsed]: No. 10748, United States Circuit
Court of Appeals for the Ninth Circuit. Martin
Culjak and Joseph Zelko, co-partners in business
under the firm name and style of Culjak & Zelko,
Appellants vs. Del E. Webb, doing business under
the name and style of Del E. Webb Construction
Co., and White & Miller, Contractors, Inc., a cor-
poration, Appellees. Transcript of Record. Upon
Appeal from the District Court of the United
States for the District of Arizona.

Filed April 24, 1944.

PAUL P. O'BRIEN,
Clerk of the United States
Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10748

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & WILLARD, CON-
TRACTORS, INC., a corporation,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD NECES-
SARY FOR THE CONSIDERATION
THEREOF; PURSUANT TO SUBDIVI-
SION 6 OF THE 19th RULE OF THIS
COURT

Appellants herein, who appeal to this court from the judgment entered on October 6, 1943, which became final and appealable on November 29, 1943 by the order of the court denying appellants' motion for a new trial, all entered in United States District Court for the District of Arizona, at Tucson, in said District, in suit numbered Civil-99-Tucson, wherein appellants were plaintiffs and appellees were defendants, adopt as their designation of parts of the record necessary on this appeal

the Stipulation As To Record signed by counsel for the respective parties and filed in the court below, the same having been transmitted to this court as a part of the record.

As appears from said stipulation, the entire record is before this court. Appellants will nevertheless state the points upon which they will rely, as follows:

The appellants contended below, and will contend in this court, that——

1) By the undisputed evidence in this case they were entitled to a judgment of \$4,166.80.

2) That the contract involved in this case required the defendants to make all necessary minor and field repairs required during the use of the trenching machine by the defendants; that on the undisputed evidence in this case the defendants did not make all necessary minor or field repairs required during their said use; and that the damages occasioned to the plaintiffs by reason of the failure of said defendants to comply with their said contract amount to \$4,166.80.

3) That the said contract was intended to and did by its terms impose upon the defendants the duty to return said trenching machine at the end of the lease period in the condition in which it was admitted to have been received, to wit, “to render efficient, economic and continuous service”, ordinary wear and tear excepted, and that the undisputed evidence in the case is that the said machine, when returned, was not in a condition to render efficient, economic or continuous service, ordinary

wear and tear excepted, and that the damages of the plaintiffs, by reason of such failure on the part of the defendants, was the sum of \$4,166.80.

4) That the court below erred in construing said contract to require of defendants the sole duty to return the said machine in a condition to be operated, regardless of the fact that such operation was inefficient, uneconomic or non-continuous.

5) That the court below erred in refusing to permit the plaintiffs to amend their complaint to allege additional damages by reason of structural injuries to the trenching machine, the ruling of the court being that if such amendment were permitted a continuance of the case would have to be granted to the defendants. Plaintiffs respectfully take the position that there was no element of surprise involved and that the amendment should have been allowed.

6) That the court erred in the matter set forth in the plaintiffs' "motion for a new trial, to strike and amend findings of fact, conclusions of law, and

for judgment for plaintiffs'', the said motion being duly incorporated in this record.

Respectfully submitted,

FRANK J. BARRY

448 S. Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Building,
Tucson, Arizona

Attorneys for Appellants.

Copy received May 9, 1944.

N. E. FLYNN

U. S. Attorney,

L.

[Endorsed]: Filed May 12, 1944, Paul P. O'Brien, Clerk.

